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No. 16388 ✓

VOL 3108 ✓

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

— *See Also*
GRACE & Co. (Pacific Coast), a corporation, *3107*

Appellant,

vs.

THE CITY OF LOS ANGELES, a municipal corporation,

Appellee.

OPENING BRIEF FOR APPELLANT.

McCUTCHEN, BLACK, HARNAGEL & SHEA,

PHILIP K. VERLEGER,

JACK T. SWAFFORD,

HOWARD J. PRIVETT,

727 West Seventh Street,
Los Angeles 17, California,

Attorneys for Appellant.

FILED

Oct 16 1964

PAUL P. O'BRIEN, CLERK

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No. 16388

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GRACE & Co. (Pacific Coast), a corporation,

Appellant,

vs.

THE CITY OF LOS ANGELES, a municipal corporation,

Appellee.

OPENING BRIEF FOR APPELLANT.

Jurisdictional Statement.

This is an action for damages for injury to plaintiff's property sustained while in a dockside shed operated by the defendant The City of Los Angeles [R. 57-73]. Original jurisdiction is vested in the district courts by 28 U. S. C. A. §1332.

The District Court of the United States, Southern District of California, was the proper court to entertain this action since both defendants originally named are residents of that district. (28 U. S. C. A. §1391(a) and (c)) [R. 8, 57].

The United States Court of Appeals for the Ninth Circuit has jurisdiction of this appeal pursuant to 28 U. S. C. A. §§1291, 1294(1). No direct review by the Supreme Court may be had in this case.

Statement of the Case.

Appellee, The City of Los Angeles, operates a building on one of its docks in Los Angeles Harbor. The building is used to receive cargo before loading on ship-board, and after discharging from vessels coming to this port. In other words, it provides the short term warehousing facilities of an ordinary marine terminal. The City collects a charge for this service, and maintains all facilities.

During the night of March 11, 1956, or the early morning of March 12, 1956, a water pipe beneath the dock failed because of corrosion. The water rose up onto the deck floor of the dock and damaged the goods of various individuals, including those of the appellant Grace & Co. (Pacific Coast).

This action followed. Originally, Outer Harbor Dock and Wharf Co. was also a defendant and had a third party complaint against Grace Line, Inc. However, prior to the conclusion of the trial, the action against Outer Harbor Dock and Wharf Co. was dismissed, and the third party complaint over, in turn, was dismissed, leaving only the action between The City of Los Angeles and the plaintiff.

The Complaint charged (in some detail) negligence in the maintenance and operation of the facility. It also charged misconduct bordering on intentional harm, since the pipe was knowingly allowed to remain in a dangerous condition with knowledge of the presence of valuable goods in the warehouse above. All of these allegations were denied by Answer. No substantial factual conflict developed at the trial (which was on the issue of liability only).

The pipe had been installed in 1914, and this failure occurred in 1956. All of the experts agreed that the failure of the pipe was caused by corrosion; all agreed that the particular area involved was characterized by a highly corrosive soil. The highly corrosive condition of the soil was also shown on maps prepared and possessed by the City. All agreed that cast iron has a bad record of frequent failure in such soil, so that such failure was to be expected at some time in some portion of the line; all agreed that cast iron pipe is not, today, installed under such conditions. Estimates of twenty to twenty-five years as the probable life of such pipe in such soil were given by experts for both parties (a life which the pipe had long passed).

It appeared without conflict that there was a substantial unaccounted, unexplained, and uninvestigated loss of water through this pipe for several months prior to the failure.

The testimony was also without dispute that The City of Los Angeles had adopted, to quote the Trial Court, a "do nothing policy" regarding inspection and replacement of its water lines. Its policy was simply to replace cast iron pipes only when leaks became so bad that water appeared on the surface, even where, as here, the pipe is of a type known to be unsuitable for the soil involved.

The Court reviewed these facts in a Memorandum Opinion, describing the hazard as follows [R. 84]:

"At the time of installation defendants did not know of the corrosive nature of the soil, but subsequent to the installation the City, or some of its departments, became cognizant that the soil in the harbor area was highly corrosive."

The Court also recognized that the policy of the City was to do nothing in the face of this hazard. It observed [R. 84]:

“Based upon economic considerations, defendants established a policy of doing nothing about maintaining, repairing or replacing such water pipe-lines until a leak occurred and water was discovered on the surface of the ground.”

The Trial Court concluded that there was no obligation to do anything, observing [R. 93]:

“Although it might have been desirable to make an inspection of the water lines every two or three years, such inspection would be prohibitively expensive and economically unfeasible. The City, like individuals, is required to take only reasonable precautions.”

Although phrased as a statement of obligation to take “only reasonable precautions”, this was in effect a conclusion that there was no obligation to do anything. There was uncontradicted evidence, to which the Court made no reference, that the laterals beneath the buildings could have been replaced inexpensively, and should have been so replaced when it became known that the soil was highly corrosive of cast iron pipe. Having rejected the idea of an obligation to inspect, and passed over in silence the contention that the pipe should have been replaced, the Court recognized no actual obligation to take any precautions.

Findings were prepared by appellee’s counsel, and executed over objections by appellant. These findings covered the subject of duty more fully. It was found expressly that the City had a policy of not maintaining the pipe lines. The Court also expressly found *untrue* plain-

tiff's allegations that the City was under a duty to provide a safe place for this merchandise.

In summary, the evidence and the Opinion note the existence of a danger to plaintiff's goods, with respect to which no action was taken. The Opinion and Findings dispose of liability on the basis that there was no duty to do anything, hence no negligence.

In our view, the principal question will be—What is the duty of the City?

Findings.

(a) Explanation.

The Findings are next set forth in this statement of the case. Many of the findings consist simply of findings that certain paragraphs of the Complaint are untrue. Other findings are that designated portions of the Complaint are true, and *all other* allegations are not true. The allegations so found to be untrue are generally crucial to a determination of the duty of the City to plaintiff. In order to have the findings that these allegations of the Complaint are untrue before the Court in intelligible fashion, we have placed the words of the Complaint so found to be untrue in brackets, preceded by the words, "it is untrue that", or similar suitable language. We have italicized this interpolated language.

(b) The Findings Themselves.

1. Plaintiff Grace & Co. (Pacific Coast) is a corporation organized under the laws of the State of West Virginia and duly qualified to do business in California. Defendant The City of Los Angeles (hereafter called "City") is a municipal corporation existing under the laws of California.

2. The Court has jurisdiction herein by virtue of Section 1332 of the United States Judicial Code and Judiciary by virtue of the fact that this is an action between citizens of different states of the United States involving in excess of \$3,000.00 exclusive of interest and costs.

3. At all times mentioned in the Second Amended Complaint the City owned and operated, by and through its Harbor Department, [but did not exclusively maintain] a steel and concrete shed at Berth 59, Pier 1, Los Angeles Harbor, in that portion of Los Angeles County known as San Pedro; said shed was used for the receipt and shipment of goods to and from Los Angeles Harbor. [*It is not true* that the City operated the said shed for hire, for the receipt of merchandise in transit from various portions of the United States and of the world to various other portions of the United States and the world. *It is not true* that said shed now is and at all times mentioned herein was used to store goods brought to Los Angeles by ship while awaiting delivery of the same to the owners hereof.]

4. * * *

5. The City, by and through its Harbor Department, at all times herein mentioned, maintained in the public street adjacent to the shed at Berth 59 an eight-inch cast iron water pipe and an eight-inch lateral therefrom leading to said shed. Said pipe and lateral were installed by said Harbor Department about 1914 and at about the same time said shed was constructed by the Harbor Department of the City. The purpose of said pipe line and lateral was solely to furnish fire protection to the shed, its loading dock, its wharf, to ships moored at the wharf and to other property and appurtenances in the nearby vicinity.

[*It is not true* that the City at all times herein mentioned exclusively owned, operated or maintained an eight-inch cast iron water pipe installed beneath said shed.]

6. * * *

7. Plaintiff on March 12, 1956, was presumptively the owner of approximately 1960 bags of coffee which had been stored in said shed at Berth 59 after having been discharged by various vessels and was awaiting delivery to plaintiff. The Court makes no finding concerning the ownership by plaintiff of any specific quantity of coffee for the reason that the trial herein was limited solely to the question of the liability of the City. Hence it was assumed only for the purpose of determining the question of liability that plaintiff owned 1960 bags of coffee.

[*It is not true* that said coffee bags were the product of various South and Central American countries or that said coffee had been discharged a short time prior to the event involved here. *It is not true* that said bags of coffee were placed in said shed at the joint and in common invitation of defendant Outer Harbor and defendant City and for the benefit of both said defendants, pecuniarily and otherwise.]

8. The City owned a cast iron pipe, as more specifically found in paragraph 5 hereof. [*It is not true* that the City in its capacity as (a) owner of said shed and said eight-inch cast iron water pipe, (b) landlord in possession of said shed and said eight-inch cast iron water pipe, and (c) as a marine terminal operator jointly and in common with defendant Outer Harbor, owed a duty to plaintiff to provide a safe shed for the interim storage of plaintiff's goods and to maintain said shed and said eight-inch cast iron water pipe in a safe and sound condition so as to prevent plaintiff's goods in

said shed from becoming lost or damaged by the entry of water into said shed.]

9. * * *

10. Defendant City did not carelessly or negligently or otherwise omit or fail to provide a safe shed for the interim, or other storage, of any of plaintiff's goods [*by reason of any of the following facts*] or for any other reason:

[(a) The floor of the said shed provided and used for such purpose by said defendants was of concrete which was poured on top of and which was dependent for support on a dirt fill which was over said eight-inch cast iron water pipe.

(b) Defendant City adopted and at all times herein mentioned pursued a policy with respect to the maintenance of said eight-inch cast iron water pipe of not inspecting said pipe or replacing the same until a break occurred and water had escaped and saturated the surrounding ground to the extent that it was detectable from the surface.

(c) Said shed did not have adequate watchmen or other available detection devices to detect leakage from said eight-inch cast iron water pipe and/or adequate watchmen or other available device at said shed to discover the entry or presence of water in said shed.]

11. It is true that the City adopted a policy of not maintaining, repairing or replacing its buried water pipe lines until some trouble was reported or some evidence of leakage developed. [*It is not true* that the City negligently and carelessly allowed said eight-inch cast iron water pipe to become ancient and in a weak, corroded and decayed condition so that said pipe could not contain

the water under the pressure placed therein by said defendant City.] The Court finds that the City was not negligent in the maintenance of said cast iron water pipe.

12. It is true that on March 12, 1956, a large quantity of water escaped from the aforesaid eight-inch cast iron lateral pipe under a pressure of approximately 65 pounds per square inch, which water flooded the floor of the shed at Berth 59 and damaged the coffee which, for the purposes of these Findings, is assumed was owned by plaintiff. [*It is not true* that a large quantity of water escaped from said pipe prior to March 12, 1956.] It is untrue that said damage, if any was caused by the negligence of the City.

13. The City was not negligent in maintaining, operating or installing the pipe which burst on March 12, 1956, or in failing to keep an adequate or any watch at said shed or in failing to discover the leakage with reasonable speed, or in any other respect. [*It is not true* that the City was negligent in maintaining high water pressure in said pipe without ascertaining whether said pipe was of sufficient strength at said time to withstand said pressure. *It is not true* that the City was negligent in permitting said pipe to remain in use when it was of such an age as, under existing conditions, rendered it unsafe for the purpose intended.]

14. That on the 25th day of April, 1956, plaintiff Grace & Co. (Pacific Coast) duly and regularly filed its verified claim covering the above-mentioned damages with Walter C. Peters, the City Clerk of the City of Los Angeles. That said verified claim specified the name and address of claimant, the date and place of the action of which complaint is made, and the extent of the damage received.

That the said claim has been rejected by defendant City. That nothing has been paid on account of the said claim or any part thereof.

15. It is true that the matters alleged in the Second Amended Complaint are within the jurisdiction of this Court but all allegations contained therein are untrue except as herein expressly found to be true.

16. It is true that said eight-inch cast iron water pipe was installed by the Harbor Department of the City in 1914 as a part of a water fire line system which at all times mentioned in the Second Amended Complaint was under the control of and operated by the Harbor Department of the City solely for the purpose of providing water for fire fighting and fire prevention.

[*It is not true* that said water pipe line system now is and at all times mentioned herein was owned and operated by defendant City in its proprietary capacity for supplying water to various consumers, for which purpose said defendant City maintained water meters and charged consumers at established rates for the use of said water.]

17. The City adopted a policy of not maintaining, repairing or replacing its buried water pipe lines until some trouble was reported or some evidence of leakage developed. [*It is not true* that said policy was adopted with disregard for the safety of goods and merchandise in said shed. *It is not true* that defendant City as the owner and operator of said eight-inch cast iron water pipe as aforesaid owed a duty to plaintiff to maintain said water pipe in a reasonably safe and sound condition so as to prevent loss or damage to plaintiff's goods stored in said shed as aforesaid by the escape of water from the said pipe.]

18. [*It is not true* that the defendant City negligently and carelessly omitted and failed to maintain said eight-

inch cast iron water pipe in a safe and sound condition or at all. *It is not true* that the City negligently and carelessly allowed said pipe to become ancient and in a weak, corroded and decayed condition so that said pipe could not contain water under the pressure placed therein by said defendant City.]

19. It is untrue that the damage, if any, to the coffee assumed to be owned by plaintiff was caused by the negligence of the City in any respect whatever.

20. It is true that the City is a local agency under the definition and within the meaning of §§53050 and 53051 of the Government Code of California; and that the shed at Berth 59, Pier 1, Los Angeles Harbor, in that portion of Los Angeles County known as San Pedro, is and on March 12, 1956, was owned by the City, and that said eight-inch cast iron water pipes installed beneath the streets outside of said shed and owned and operated by the Harbor Department of the City is public property under the definition of and within the meaning of §§53050 and 53051 of the Government Code of California.¹

21. It is untrue that on or about March 12, 1956, or at any time prior thereto, the City or its Harbor Department planned, constructed, installed or maintained its said pipe line in a manner or according to a design in-

¹Finding No. 20 also contains the following statement:

"The remaining allegations of paragraph II of the Third Cause of Action are untrue."

There are, however, no "remaining allegations". The finding differs from the allegations of said paragraph in only one respect—the Complaint refers to pipe installed "beneath said shed", whereas the finding refers to pipes installed "beneath the streets outside of said shed". Certainly the Court did not intend to find that the service laterals running from the street and extending under the shed were not "public property". Accordingly, plaintiff submits that the finding should be read as including the pipe beneath the said shed.

herently, or otherwise, dangerous or defective for the intended use or the use made of said property. It is true that said cast iron pipe was installed about 1914 by the Harbor Department of the City and was buried approximately 9 to 10 feet underground and under a concrete floor or loading dock or platform and covered with a compacted dirt fill, and that the City followed a policy of not inspecting such buried pipe or replacing the same until some trouble was reported or some evidence of leakage developed.

[*It is not true* that said public property was in a dangerous and defective condition for many years prior to March 12, 1956, in that:

(a) The floor of the said shed was constructed by laying a wire mesh over the top of said compacted dirt fill and pouring concrete of a depth of approximately six inches on top of said wire mesh without the use of reinforcing steel. Said floor was dependent for support on the said dirt fill and could not withstand the weight of the cargo intended to be placed thereon and which was regularly and usually placed thereon.

(b) Said shed did not have adequate watchmen or other available detection devices to detect leakage from said eight-inch cast iron water pipe and/or adequate watchmen or other available devices at said shed to discover the entry or presence of water in said shed.

(c) Said eight-inch cast iron water pipe was ancient and in a weak, corroded and decayed condition so that said pipe could not contain water and rendered it unsafe for the purpose intended.

(d) Said eight-inch cast iron water pipe was of such an age and under existing soil conditions said pipe could not reasonably have been expected to contain water under pressure therein.

(e) Or in any other respect.

It is not true that by reason of any of these premises plaintiff's goods situated in said shed were subjected to great and unreasonable risk of loss or damage from the condition of said public property.]

22. [*It is not true* that the City knew and had notice of the condition of said public property referred to in paragraph 21 hereof. It is not true that the City in the exercise of reasonable care in the ordinary course of the business and governmental activities it conducted should have known or had notice of the condition of said public property referred to in paragraph 21 hereof.]

23. [*It is not true* that the City had knowledge or notice or should have had knowledge and notice of the following matters and conditions:

(a) That underground cast iron pipe, such as the said eight-inch cast iron water pipe installed, owned and maintained by defendant City beneath said shed as alleged is subject to deterioration and failure from graphitic corrosion and that when such pipe is exposed to soils near the sea the rate of deterioration and failure from graphitic corrosion is greatly increased.

(b) That the danger of failure of underground cast iron pipe from graphitic corrosion in the Harbor District in that portion of Los Angeles County known as San Pedro is particularly great.

(c) That the said eight-inch cast iron water pipe installed, owned and maintained by defendant City beneath said shed as alleged was of such an age, as under existing conditions, to render it unsafe and make it unreasonable to expect said pipe to contain water under pressure therein.

(d) That by failing and omitting to install and make use of available detection devices to discover leakage from said eight-inch cast iron water pipe and by not inspecting said pipe or replacing the same until a failure occurred and was detected from the surface, that the goods and merchandise in said shed would be subject to great risk of loss or damage by the flooding of said shed with water.

(e) That when said eight-inch cast iron water pipe failed and was unable to contain water under the pressure therein that the fill supporting the floor of said shed would be saturated with water and would subside and that the goods and merchandise in said shed would be subject to great risk of loss or damage by the collapse of said floor and/or the flooding of said shed with water.]

24. [*It is not true* that the City for a reasonable time after it knew and had notice of the condition of said public property had ample opportunity to take action necessary to protect the public, including the plaintiff herein, against said condition. *It is not true* that the City negligently and carelessly failed and omitted to correct the condition of said public property or to protect the public, including plaintiff, against the said condition.]

25. It is true that on March 12, 1956, water escaped from said pipe, all as more particularly set forth in paragraph 12 hereof. [*It is not true* that in failing and omitting to remedy said condition or to take action to protect the public, including the plaintiff, against said condition, the City negligently and carelessly caused said coffee to be damaged by reason of the escape of water from said pipe by reason of the condition of said public property.]

26. It is true that at all times mentioned in the Second Amended Complaint the Board of Harbor Commissioners of the City of Los Angeles was the duly constituted authority having jurisdiction, superintendence and control, under the provisions of the Charter of said City, of the Harbor Department, a branch of the government of said City, and the shed and pipe lines in and about Berth 59 at Los Angeles Harbor.

27. It is true that the City had no opportunity for a reasonable time or any time after acquiring notice or knowledge or receiving notice to remedy any condition existing in said water pipe or to take any action reasonably necessary to protect plaintiff against said condition after acquiring notice thereof.

28. * * *

Specification of Errors.

(a) Assignments of Error Relating to the Duty of the City.

1. The Court erred in finding untrue [Finding No. 3, R. 100, 101] the following portions of Paragraph III of the Second Amended Complaint [R. 58]:

“That defendant City at all times . . . exclusively maintained a certain steel and concrete shed at Berth 59, Pier 1, Los Angeles Harbor in that portion of Los Angeles County known as San Pedro (hereinafter referred to as the said shed). Defendant City, together with defendant Outer Harbor at all times mentioned herein operated the said shed, for hire, for the receipt of merchandise in transit from various portions of the United States and of the world to various other portions of the United States and the world. Said shed now is and at all times mentioned

herein was used to store goods brought to Los Angeles by ship while awaiting delivery of the same to the owners thereof.”

Finding No. 3 is to the effect that the City owned and operated Berth 59; that it was used for the receipt and shipment of goods to and from Los Angeles Harbor, and that the “remaining” allegations of paragraph III of the Second Amended Complaint are untrue. The language quoted above is this remainder. The important allegations thus found to be untrue are that the City exclusively maintained the shed; and that it was operated by the City for hire, in the way described. The finding thus made, that the City did not exclusively maintain the shed is contrary to the uncontradicted testimony of the witness Berry [R. 296], which was never in any way disputed. The finding that the City did not offer the shed for hire, for the storage of goods in transit to and from places all over the world, is contrary to the provisions of the City’s Tariff, governing the use of the premises, copy of which was filed as Exhibit B. There was no evidence to the contrary.

2. The Court erred in finding untrue [Finding No. 7, R. 101, 102] the following allegations of Paragraph VII of the Complaint [R. 60, 61]. This finding, again, is a finding that the “remaining” allegations of Paragraph VII are untrue. The allegations are:

“Plaintiff Grace & Co. (Pacific Coast) was at all times hereinafter mentioned the owner of approximately, 1960 bags of coffee, the product of various South and Central American Countries, which said coffee was at all times hereinafter alleged resting in said shed having been a short time prior thereto discharged by various vessels and was then and there

awaiting delivery to plaintiff. Said bags of coffee were placed in said shed at the joint and in common invitation of defendant Outer Harbor and defendant City and for the benefit of both said defendants, pecuniarily and otherwise.”

The crucial finding here is the denial that the coffee was placed in the warehouse at the invitation of the defendant for its pecuniary benefit. Said finding is contrary to the uncontradicted testimony of the witness Berry that plaintiff’s merchandise was in the subject premises, having been discharged from the ship and awaiting pickup, [R. 296], and to the evidence of the City’s Tariff [Ex. B] that the dock is offered for hire for this use.

3. The Court erred in finding untrue [Finding No. 5, R. 101] the following allegations of Paragraph V of the Second Amended Complaint [R. 60], by finding the “remaining” allegations of Paragraph V untrue. These allegations read as follows:

“As an integral part of said shed and the marine terminal facility operated therein as aforesaid, defendant City at all times herein mentioned *exclusively* owned, operated and maintained an eight-inch cast iron water pipe installed beneath said shed.” (Emphasis added.)

The Court found affirmatively in Finding No. 5 that the City maintained this pipe *in the public street*. This is contrary to the express testimony that the pipe commenced in the public street and went underneath the building, and to the testimony which, without dispute, was that the break itself was beneath the loading platform of the building [R. 148]. Likewise, this finding

denies that the City *exclusively* maintained this pipe, and uncontradicted testimony was to the effect that it did [Berry, R. 296].

4. The Court erred in finding untrue [Finding No. 16, R. 104] the allegations contained in Paragraph III of the Second Cause of Action of the Second Amended Complaint [R. 65], which reads as follows:

“That said eight-inch cast iron water pipe was installed about the year 1914 by defendant City as a part of a water pipeline system which now is and at all times herein mentioned was owned and operated by defendant City in its *proprietary capacity*. . . .”
(Emphasis added.)

We believe that the testimony shows beyond any question that this water pipe was operated either as part of the City’s water system, or as part of its warehouse facility. There is no question under the law but that either is a proprietary, not a governmental activity.

We contend that these errors are critical. A failure to recognize a relationship which gives rise to a duty of care must lead to error in the determination of negligence. The importance of these errors is made highly explicit by the specifications in the succeeding assignments of error.

(b) Assignments of Error Relating to the Standard of Care Itself.

5. The Court erred in finding untrue [Finding No. 8, R. 102] the following allegations of Paragraph VIII of the First Cause of Action of the Second Amended Complaint [R. 61]:

“Defendant City in its capacity as (a) owner of said shed and said eight-inch cast iron water pipe,
(b) landlord in possession of said shed and said

eight-inch cast iron water pipe and (c) as a marine terminal operator jointly and in common with defendant Outer Harbor, owed a duty to plaintiff to provide a safe shed for the interim storage of plaintiff's goods and to maintain said shed and said eight-inch cast iron water pipe in a safe and sound condition so as to prevent plaintiff's goods in said shed from becoming lost or damaged by the entry of water into said shed."

6. The Court erred in concluding, in its Opinion, [R. 83-94] that the standard of care applicable is the custom of other municipalities.

7. The Court erred in concluding, in its Opinion, [R. 83-94] that there was no duty to inspect, repair, or replace pipes beneath defendant's warehouse, and that a policy of non-maintenance was not negligence.

8. The Court erred in finding that the City was not negligent in its maintenance of the eight-inch cast iron water pipe installed beneath the transit shed at Berth 59 and the loading platform attached thereto. (A finding of no negligence is made in each of the following numbered findings: 10, 11, 12, 13, 17, 18, 19, 21, 24, 25 and 27 [R. 102-107]. In addition, Findings No. 22, 23 and 27 are predicated wholly upon the assumption that the City was not negligent in any respect.) This determination of no negligence is clearly erroneous for several reasons:

(a) The finding of no negligence follows inevitably from the finding that there was no duty, which is clearly erroneous;

(b) This is a case in which, since defendant was a warehouseman, defendant carries the burden of proving that the damage occurred without its neg-

ligence. No evidence was offered meeting this burden.

(c) This is a case in which the Doctrine of *res ipsa loquitur* applies to place the burden on the defendant of going forward with evidence accounting for the break in a way that is indicative that there was no negligence on its part. No evidence to this effect was offered.

(d) This finding is clearly contradicted by the finding and the evidence that the policy of the City was not to repair, replace or maintain its pipe until water appeared on the surface of the ground.

(e) The Trial Court's determination that the City was not negligent is tied firmly to its erroneous finding that the operation and maintenance of the eight-inch water line involves a governmental rather than a proprietary operation by the City. The statutory standard of care applicable to a local agency such as a city, acting in its governmental capacity, is not as demanding as that imposed upon a local agency when engaging in a proprietary activity.

(f) Even if it be assumed, *arguendo*, that the governmental standard of care was the applicable standard, the Court should have found that the City acted negligently in discharging its statutory obligations. More specifically, the Court erred in finding that the eight-inch water line system was not in a "defective and dangerous condition" [Finding No. 21; R. 105]; that the City did not know or have notice of the condition of said water line system [Findings No. 22 and 23]; and that the City had no opportunity for a reasonable time after acquiring notice or knowledge of the condition of said pipe to take any action reasonably necessary to protect

plaintiff's property [Findings No. 24, R. 105 and Finding No. 27, R. 106, 107]. Those findings, as well as the general findings of no negligence enumerated above, are clearly erroneous. It is clear from the evidence that the City had actual or constructive notice of the defective and dangerous condition existing in said water line system (*it had leaked for months*), and that for a reasonable time after acquiring such notice failed to remedy the condition or to take any action reasonably necessary to protect the public against the condition.

(c) Assignment of Error Relating to the
Admission of Evidence.

9. The Court erred in admitting over plaintiff's objection and in failing to strike from the record upon motion an answer given by the City to an interrogatory propounded to it by the plaintiff pursuant to Rule 33 of the Rules of Civil Procedure. The answer so put in evidence was from the document entitled "Additional Answers to Interrogatories Numbered VIII, XIII, XIV, XVI and XVII, submitted by Defendant City of Los Angeles as Required by Court Order Made February 25, 1957." [R. 37-39, 163-164.] Said answer stated that on further investigation and study of Harbor Department records the City found itself to have been in error with respect to the answer made to interrogatory No. XIV(b) previously put in evidence by plaintiff concerning two prior leakages due to corrosion in Harbor Department pipes in the area of Berths 59 and 60. [R. 156-157.] That evidence and plaintiff's objections thereto are as follows:

"Mr. Yoakum: Just, a minute, your Honor please, Counsel has not completed the answers to the interrogatories. As I said to your Honor, that answer was explained in the additional answers.

The Court: He wanted to read something in the interrogatory and you objected. You wanted this all read at one time. This is the only interrogatory he has presented. If you wanted to present another interrogatory at the proper time, you may do so. I don't know what it is.

Mr. Yoakum: We think, your Honor, when a witness makes an answer and then corrects it, certainly if he says one thing in a deposition, counsel can't just drop him there when he has corrected it some pages later.

The Court: Where are the other interrogatories?

Mr. Yoakum: That was filed July 15, 1957, additional answers to interrogatories.

The Court: Additional answers to interrogatories.

Mr. Yoakum: Yes. There is an answer with this same affiant. I submit in fairness, so that it will be in its proper context, it should be read.

The Court: What interrogatory do you want read?

Mr. Yoakum: What is on page 2 and goes over to page 3. It is headed, "Answer to First Requirement."

The Court: Don't you think this interrogatory and answer should be read?

Mr. Verleger: I think the original document is an answer and as such is admissible. I think the subsequent one is self-serving and for that reason—

The Court: Well, you go ahead and read it, anyway. Let's get it into the record.

Mr. Verleger: Can you give me the page again?

Mr. Yoakum: Start at the top of page 2.

The Court: That was filed July 15th.

Mr. Verleger: That's right, and the others, as I recall, were filed in January.

Mr. Yoakum: February 15th.

The Court: Start at the top of the page.

Mr. Verleger: 'First: Respecting plaintiff's Interrogatory Number 8, the defendant THE CITY OF LOS ANGELES is required to give the dates of any reports made where evidence of a leakage occurred as to piping in the transit shed referred to in the defendant's answer to plaintiff's said Interrogatory No. 8, and to give the name of the person to whom said report was made.'

The answer:

'The dates of any reports made where evidence of a leakage in the transit shed referred to in defendant's Answer to Plaintiff's Interrogatory No. VIII, and the name of the person to whom said report was made, are as follows: No leakage due to corrosion or otherwise was ever reported prior to the escape of said water from said pipe, in said pipe or in other piping inside the transit shed referred to at Berth 59. The date and the names of the persons making and receiving the report on the leakage which occurred March 12, 1956, are given in the Answer to Interrogatory No. VI.

'Upon further investigation and study of Harbor Department records, affiant finds himself to have been in error with respect to incidents of prior leakage given in his Answer to Interrogatory No. XIV (b) heretofore made as follows: "On February 15, 1954, a section of five-inch cast iron bell and spigot water pipe was replaced, due to corrosion, at Berth 60. On October 11, 1955, a section of eight-inch

cast iron bell and spigot water pipe was repaired, due to corrosion, at Berth 59.”

‘Affiant now corrects said answer quoted above to read as follows: On February 15, 1954, a section of five-inch cast iron bell and spigot water pipe inside the transit shed at Berth 60, which shed is separated by a concrete fire wall and driveway from the transit shed at Berth 59, was repaired due to a straight sheer from an unknown cause. This break was not due to corrosion. The transit shed at Berth 60 was empty at the time and no cargo damage occurred. No record of a report of leakage has been found in Harbor Department files. The broken pipe was repaired with a split sleeve at a time when a bulkhead within the said transit shed was undergoing repair. On October 11, 1955, at 4:15 p.m., Harbor Department plumber Dale Pence was notified by telephone by Margaret Reynolds, secretary in the Operating Division, of a water leak at Berth 59 in the street outside the transit shed opposite Door 25. On October 13, 1955, the leak, due to a broken leaded joint, was repaired. This leak was not caused by corrosion. No water damage occurred in the transit shed at Berth 59 at said time.’ Your Honor, in view of my prior objection, I would move to strike that on the ground it is self-serving. The Court: Denied.” [R. 161-165.]

Summary of Argument.

We have not been able to escape the feeling that we owe the Court an apology for the time we will have to spend in proving the obvious. Each of the propositions urged herein, we believe, is a familiar one. Yet each has been the subject of extended argument in the briefs previously filed with the Trial Court, and many of them

have been resolved against us. We have to assume, therefore, that they must be argued fully here. To the extent, nevertheless, that we extend ourselves on points which the Court well knows, we can only again express our regret.

The basic points in our argument are the following:

First: The City's function is that of a marine terminal operator, essentially a warehouseman. As such, it offered the premises in question to the general public for a price. As such, if its liability is the same as that of a private individual, it was under an obligation to maintain its premises in a safe condition for the protection of the goods stored. Findings to the contrary are clearly erroneous.

Second: The City, in carrying on this terminal business, was acting in a proprietary capacity. Therefore, it was subject to the same liability as a private individual. Again, the finding that a governmental activity was involved is clearly erroneous.

Third: The City did not keep its premises in repair. On the contrary, it was the City's policy to do nothing about either inspecting or replacing superannuated pipe until water appeared on the surface. This policy was adopted and maintained despite the fact that the pipe in question was unprotected cast iron pipe in highly corrosive soil, where the anticipated life of the pipe was only on the order of 15 to 20 years, and the pipe had been in for something like 40 years. This was so, even though there was, apparently, a considerable leakage through the pipe which was undiscovered by the City, which could have been discovered at any time by reading the meters.

On these facts, which will be detailed below, liability would arise, (a) because there is a total failure of per-

formance of the duty of the warehouseman; and (b) because the Doctrine of *res ipsa loquitur* applies where a pipe fails; and (c) because there was no evidence rebutting the inference which arises under *res ipsa*.

We think, in reviewing this portion of the case, that a fact which will startle the Court is the extent and the intimacy of the City's knowledge of the hazards involved, and the indifference of the Harbor Department to those hazards.

This pipe failed because of what is called graphitic corrosion. That means simply that the pipe rusted out.

Cast iron pipe, in non-corrosive soil, has a durability which is legendary. In corrosive soil, however, the record of such pipe is not good, but lamentably bad. As one of the City's experts reported some twenty years ago, in such soils it has about the worst record of any material generally used. Today, cast iron pipe is recognized as an unsuitable material for use in such soil.

Long prior to the failure, the City had taken soil samples in the vicinity of this warehouse. Years before this failure they had prepared maps which showed this soil to be highly corrosive. There was substantial agreement between the City's expert and plaintiff's expert that failures of cast iron pipe are to be considered as probable in such soil after twenty to twenty-five years. This pipe had been in for forty years.

This was not merely a theory. There had been a number of previous failures of pipe of like age in this general area. And the evidence went beyond this. The City's records *showed an unaccounted for flow of water through this particular pipe on the order of 130 cubic feet a day for months prior to this failure*. The testimony of the City's witnesses was that such a *flow indicated that something serious was the matter*.

The only explanation and the only justification for total inactivity was testimony that it is generally not customary in the utility industry to remove cast iron pipe from corrosive soil, until failures become so frequent that it is cheaper to replace the pipe than it is to patch it. The explanation for this practice given by one witness was simply that it is *cheaper to pay claims than it is to go in and replace pipe*. The only other explanation offered by anyone else was that it is expensive to replace entire pipe systems.

This is the only justification offered by the defense. It would seem apparent that where there is a duty of care, the mere fact that it is inexpensive to do nothing is no defense. It may well be cheaper to replace one's tires on one's car, only after they blow out. We hardly think any court would consider this to justify a deliberate decision to ignore the effect of wear and tear on one's tires.

Nevertheless, since this is the only excuse offered, we believe it will be necessary to point to the authorities which establish that a custom which is founded solely on considerations of economy, rather than care of the goods bailed, is not an excuse for non-performance of the warehouseman's duty, and to point out that a deliberate decision on the part of a warehouseman not to maintain his premises is really, in effect, an assumption of liability.

Fourth: We will contend that even if the City's activities be treated as governmental, the requisites of liability exist.

Fifth: We will contend that the Court erred in admitting the City's answers to plaintiff's interrogatories as evidence for the City.

ARGUMENT.

I.

Defendant Was Under a Duty to Maintain Its Premises in a Safe Condition. The Court Erred in Finding to the Contrary. (Specifications of Error Nos. 1-8.)

(a) Preliminary.

Before we talk about what the City did in this case, we think we should clear the underbrush about their obligation to do something. We think the major question in this case is—What is the City's obligation? To decide that question, one needs to ask—What was the City's relation to the cargo?

The pleadings and Findings as to the relation were as follows:

Paragraph III of the Second Amended Complaint alleged the following [R. 58]: (The italicized portions seem to have been found to be untrue, as per the finding next quoted.):

“That defendant City at all times mentioned herein owned *and exclusively maintained* a certain steel and concrete shed at Berth 59, Pier 1, Los Angeles Harbor in that portion of Los Angeles County known as San Pedro (hereinafter referred to as the said shed). *Defendant City, together with defendant Outer Harbor at all times mentioned herein operated the said shed, for hire, for the receipt of merchandise in transit from various portions of the United States and of the world to various other portions of the United States and the world. Said shed now is and at all times mentioned herein was used to store goods brought to Los Angeles by ship while awaiting delivery of the same to the owners thereof.*” (Emphasis added.)

The Findings respecting Paragraph III of the Second Amended Complaint were as follows: [R. 100-101]:

“At all times mentioned in the Second Amended Complaint the City owned and operated by and through its Harbor Department a steel and concrete shed at Berth 59, Pier 1, Los Angeles Harbor, in that portion of Los Angeles County known as San Pedro; said shed was used for the receipt and shipment of goods to and from Los Angeles Harbor.

“The remaining allegations of paragraph III of the Second Amended Complaint are untrue insofar as they refer to the City.”

The net of this is that while it was found that the City owned and operated Berth 59, it was found not to be true that the shed was operated by the City for hire, and not to be true that it was used for the storage of goods awaiting delivery.

Paragraph VII of the Second Amended Complaint alleged as follows (referring to plaintiff's coffee) [R. 60-61]:

“Plaintiff Grace & Co. (Pacific Coast) was at all times hereinafter mentioned the owner of approximately 1,960 bags of coffee, the product of various South and Central American Countries, which said coffee was at all times hereinafter alleged resting in said shed having been a short time prior thereto discharged by various vessels and was then and there awaiting delivery to plaintiff. Said bags of coffee were placed in said shed at the joint and in common invitation of defendant Outer Harbor and defendant City and for the benefit of both said defendants, pecuniarily and otherwise.”

This was found to be untrue in its entirety (except as to the allegations re title, which were passed over).

Paragraph VIII of the Second Amended Complaint reads as follows: [R. 61]:

“Defendant City in its capacity as (a) owner of said shed and said eight-inch cast iron water pipe, (b) landlord in possession of said shed and said eight-inch cast iron water pipe and (c) as a marine terminal operator jointly and in common with defendant Outer Harbor, owed a duty to plaintiff to provide a safe shed for the interim storage of plaintiff’s goods and to maintain said shed and said eight-inch cast iron water pipe in a safe and sound condition so as to prevent plaintiff’s goods in said shed from becoming lost or damaged by the entry of water into said shed.”

This was found to be untrue [Finding No. 8, R. 102] as follows:

“The allegations of Paragraph VIII insofar as they refer to the City are untrue except that it is true that the City owned a cast iron pipe as more specifically found in paragraph 5 hereof.”

In sum then, the Findings recognize that the City owned and operated Berth 59. They find that the City was *not* a marine terminal operator, and was *not* under any obligation to provide a safe place for the storage of plaintiff’s merchandise. Of course, if there was no duty, the subsequent findings of no negligence follow. If there was a duty, the error in failing to recognize it would make errors very likely, if not inevitable, in determining negligence.

At this point, we need, therefore, to refer to the evidence as to the use of these premises, to see what the City was and what it did.

(b) Use of These Premises.

It is alleged and found that the City operated these premises. What were they operated for?

The Tariff of the City of Los Angeles, for the use of these premises, was in evidence. [Ex. B, R. 423.] It refers to port terminal facilities as "wharf premises" [Ex. B, Item 100]. The City makes a charge which it calls "wharfage" for "the service or use of a municipal wharf and wharf premises" for the deposit in a wharf, or the handling on a wharf, of inbound or outbound merchandise. [Ex. B, Items 400, 405, 410, 415.] Wharfage is collected from the vessel responsible for the presence of the merchandise. [Ex. B, Items 425, 430, *et seq.*] In addition to wharfage, if the merchandise stays for a longer period than five days on coastwise, or ten days on foreign, further charges known as "storage" and "demurrage" are assessed. [Ex. B, Items 500-525.] This is charged against the merchandise itself, and the owner must pay these charges to obtain possession of his goods. [Ex. B, Items 500-515.]

The actual assembly and distribution of merchandise is carried on by individuals known as "Berth Assignees". [Ex. B, Item 605.] The Berth Assignee does not have exclusive possession. On the contrary, the City retains the right to put other assignees in portions of the premises. [Ex. B, Item 605; and R. 296, 297], and the City does all maintenance. [R. 19, 20.] Berth 59 was used in just this way. [R. 296, 297.]

The bags of coffee involved in this lawsuit had been discharged from the ship and were awaiting delivery. [R. 297.]

To sum up, then, the City provides maintenance and retains control of a building which, for a price, it uses for the storage and handling of cargo. This is, of course, an ordinary warehousing function. The findings to the contrary are erroneous.

(c) **The Legal Obligation of a Warehouseman to
Maintain His Premises.**

What then, is the maintenance obligation of a person offering his premises for hire to the public for storage of their merchandise?

This question has been explicitly answered time and again. We quote the opinion of the leading case of *Buffalo Grain Co. v. Sowerby*, in the Court of Appeals of New York, 195 N. Y. 355, 88 N. E. 569 (1909) wherein the Court made the following observation:

“The association, therefore, as a warehouseman, must be deemed to have held out to the public this elevator as a proper and fit building in which to store grain. Buildings of this character are liable to deteriorate. They may be weakened by storms and winds, and, when constructed upon piles over waters or low lands, the piles may decay and the foundation become weak, endangering the structure. *A warehouseman, therefore, in the exercise of reasonable care, owes a duty to his patrons of making reasonable inspection from time to time to see that the building remains safe and in a proper condition.*” (Emphasis added.)
88 N. E. 570.

The *Buffalo Grain Co.* case was followed in *Stein Hall & Co. v. Sealand Dock & Terminal Corp.*, 149 N. Y. Supp. 2d 537 (1956) against a corporation which was performing precisely the function of the defendant. The case involved 4,000 plus bags of flour placed by the

carrier on a dock in New York. The dock collapsed due to decay. The Court said concerning liability:

“It is conceded that the Dock Co. operated, maintained and controlled the Huron Street pier. Therefore, the duty was imposed upon it to *keep and maintain said structure in a good and safe condition*.

“I find from all of the adduced testimony that the Dock Co. failed in this duty and that the sole proximate cause of the collapse of the pier was occasioned by such failure.

“There is ample basis in the testimony and in the photographs submitted in evidence to justify the opinion offered by the plaintiff’s experts to the effect that the pier collapsed solely because of the rotted, defective and badly deteriorated condition of its supporting structure and sub-structure. This opinion was not overcome by the testimony offered by the defendants’ experts. The evidence offered by the defendants concerning the periodic inspections and repairs to the pier was neither impressive nor persuasive and finds no substantiation in the photographs in evidence.” (Emphasis added.) 149 N. Y. Supp. at 542.

It is worth noting that in that case, the defendant at least made a showing that there had been inspections of the dock. In the present case, as will be seen, the showing was that the City’s custom was *not* to make inspections. Our case is an *a fortiori* one for liability.

In *Schell v. Miller North Broad Storage Co.*, 45 Atl. 2d 53 (1946), the Supreme Court of Pennsylvania reached the same conclusion, where damage was

caused by the deterioration of fire doors. In the words of the Court:

“Installing the fire doors according to a statute or an ordinance was not the full measure of appellee’s duty. It was *obliged to maintain them in such condition that they would perform the function for which they were installed. DeGrazia v. Piccardo*, 15 Pa. Super. 107. Appellee could not assume, contrary to all human experience, that the fire doors would continue to operate simply because there were no obvious defects and because they had been in use for many years. It was required to maintain doors, and the doors were effective only if kept in a fit condition; it was obliged to keep them in repair; and for the purpose of making repairs it was required to make such inspections as were reasonably necessary to discover such defects as might exist.” (Emphasis added.) 45 Atl. 2d at 56.

The same principles have been followed in the Federal Courts and in California.

In *General Motors Corp. v. The Olancho*, 115 F. Supp. 107 (S. D. N. Y. 1953) affirmed *per curiam*, 220 F. 2d 278 (C. A. 2d, 1955), the Court had before it the related question of what constitutes due diligence to make a vessel seaworthy. The particular case involved damage due to failure by reason of corrosion of a part of the vessel’s framing, just as the present case involves damage by reason of corrosion of a pipe. The framing in question was normally under a ceiling of wood over the turn of the bilge. Warnings had been circulated that such plating was subject to corrosion (just as in the present case there was ample warning that piping in the soil types existing at Signal Street was subject to corrosion). It was held that

the failure to inspect for and discover this corroded area constituted negligence.

California & Hawaiian Sugar R. Corp. v. Harris County, etc. Dist., 27 F. 2d 392 (D. C. Tex. 1928) is most similar to the present case. That case involved the storage of sugar at a wharf. The sugar became wet because a water pipe broke beneath the wharf. The Court held that the Doctrine of *res ipsa loquitur* applied, and held the dockman liable.

These cases rest on the simple principle that it is the obligation of the warehouseman to exercise reasonable care to protect the merchandise of which he has custody. That duty is spelled out in the California statutes and cases, and in the decisions of this Court:

Lawrence Warehouse Co. v. Defense Supplies Corp., 164 F. 2d 773 (C. C. A. 9th 1947);

Chatterton v. Boone, 81 C. A. 2d 943, 185 P. 2d 610 (1947). (Duty of a warehouseman to protect watersoaked property against deterioration);

Scott's V. F. Exch. v. Growers Refrig. Co., 81 C. A. 2d 437; 184 P. 2d 183 (1947). (Warehouseman storing fruit must maintain storage rooms at suitable temperatures);

Crescent Bed Co. v. Jonas, 206 Cal. 94, 273 Pac. 28 (1928). (Bailee storing bed springs must protect against water so as to avoid rust).

We believe, under these authorities, that the City was under an obligation to provide a suitable warehouse, since it offered its services to the public as a warehouseman. And we submit therefore, that the finding that there was no duty was wrong.

There remains for consideration on the subject of duty, one major question. The Trial Court found that the City's

activity was governmental, not proprietary. The cases above concern private individuals. A different standard would apply if this was a governmental activity. We pass, therefore, to this question.

II.

The Court Erred in Finding That the City in Its Operation and Maintenance of the Eight-Inch Water Line System in the Area of Berth 59, and Under the Jurisdiction of Its Harbor Department, Was Connected With a Governmental Function, and That the City Did Not Act in a Proprietary Capacity in Such Operation and Maintenance. (Specification of Error No. 4.)

The Second Amended Complaint was in two counts, the first stating allegations suitable to proprietary liability, and the second for governmental. The Court found [Findings No. 16 and 20, R. 104] that the City operated and maintained the eight-inch water line system in the area of Berth 59 as a governmental activity.

That finding is subject to review in its entirety, for a finding of fact will always be set aside where it was induced by an erroneous view of the law.

General Casualty Co. v. School District No. 5,
233 F. 2d 526, 527-8 (C. A. 9th 1956).

It is clear that it is solely a question of law whether under a given set of facts an act of a municipality is performed as part of a governmental function or as part of a proprietary activity.

Carr v. City & County of San Francisco, 170 Adv.
Cal. App. 54, 58, 338 P. 2d 509 (1959);

Barrett v. City of San Jose, 161 C. A. 2d 40,
42, 325 P. 2d 1026 (1958).

Furthermore, it is settled that an appellate court is always concerned with determining whether the Trial Court arrived at and applied a proper standard of care in a particular case.

Maragakis v. United States, 172 F. 2d 393, (C. A. 10th, 1949);

Clinkscales v. Carver, 22 C. 2d 72, 76, 136 P. 2d 777 (1943).

Was there, then, a governmental act?

It is clear that the governmental powers of a city are those pertaining to the making and enforcing of police regulations, the prevention of crime, the preservation of the public health, the prevention of fires, the caring for the poor, and the education of the young.

Chafor v. City of Long Beach, 174 Cal. 478, 487, 163 Pac. 670 (1917).

It is only when a municipality acts in the performance of such a governmental function that the operation of all buildings and instrumentalities connected therewith involve the discharge of a governmental function.

Chafor v. City of Long Beach, cited *supra*;

Sanders v. City of Long Beach, 54 C. A. 2d 651, 129 P. 2d 511 (1942).

The function with which this action is principally concerned is that engaged in by the Harbor Department of the City of Los Angeles in operating Berth 59 (a part of the facilities of the harbor of Los Angeles at San Pedro) and the adjacent transit shed, as a marine terminal for hire, and for which the City at established rates charged for dockage, wharfage, demurrage, storage and incidentals in connection with its use. One of the instrumentalities used in that activity (owned and exclusively

maintained and kept in repair by the Harbor Department) was an eight-inch, sand-molded cast iron water main used for the fire hydrants and sprinkler system of Berth 59 and the adjacent transit shed.

The authorities are clear and uniform in holding that the above-described activity is private and proprietary, and does not in any sense involve a governmental function.

United States v. Certain Parcels of Land, 63 F. Supp. 175, 184-186, (S. D. Cal. 1945);

Schwerdtfeger v. State of California, 148 C. A. 2d 335, 306 P. 2d 960 (1957);

Ravettino v. City of San Diego, 70 C. A. 2d 37, 160 P. 2d 52 (1945); and

see, *Coleman v. City of Oakland*, 110 Cal. App. 715, 720, 721, 295 Pac. 59 (1930); and

cf. *People v. Superior Court*, 29 C. 2d 754, 178 P. 2d 1 (1947).

In the case first cited (63 F. Supp. 175) it was held that the dock, wharves and facilities incidental thereto located at the harbor of Los Angeles were operated by the City of Los Angeles in a proprietary capacity.

In addition, the law is equally certain that in California the operation of a municipal water system is a proprietary activity.

South Pasadena v. Pasadena Land etc. Co., 152 Cal. 579, 593, 93 Pac. 490 (1908);

Nourse v. Los Angeles, 25 Cal. App. 384, 385, 154 Pac. 801 (1914);

Coleman v. City of Oakland, 110 Cal. App. 715, 720, 721 (1930);

Sanders v. City of Long Beach, 54 C. A. 2d 651, 660, 661, 129 P. 2d 511 (1942).

In the *Nourse* case it was expressly decided that when the City of Los Angeles acted in the performance of its assumed duty of operating a water system for the purpose of supplying water to its inhabitants, it did not act in its sovereign capacity, but in the capacity of a private corporation engaged in like business. Accordingly, the conduct of the Water Department also is to be judged not by the provisions of Section 53051 of the Government Code, but by the standard of care applicable to a private individual.

While the question has not arisen in California, it has been consistently held elsewhere that operation of a water system remains a proprietary function, where the water is used for a warehouse sprinkler system, *City of Richmond v. Virginia Bonded Warehouse Corp.*, 138 S. E. 503 (Va. 1927); or for fire mains generally, *Blake-McFall Co. v. City of Portland*, 135 Pac. 873 (Ore. 1913), *Boyle v. City of Pittsburgh*, 21 Atl. 2d 243 (Pa. 1941), *Dunston v. City of New York*, 91 App. Div. 355, 86 N. Y. Supp. 562 (1904). There are no cases to the contrary. The finding that this water was used for fire protection purposes [Finding No. 5, R. 101] does not justify the conclusion that a proprietary activity was not involved.

From the erroneous conclusion that this was a governmental activity, an error in determining the standard of care would necessarily follow. The governmental standard of care is prescribed by Section 53051 of the California Governmental Code. That section provides as follows:

“A Local agency is liable for injuries to persons and property resulting from the dangerous or defective condition of public property if the legislative

body, board, or person authorized to remedy the condition:

(a) Had knowledge or notice of the defective or dangerous condition.

(b) For a reasonable time after acquiring knowledge or receiving notice, failed to remedy the condition or to take action reasonably necessary to protect the public against the condition."

We have hitherto described the proprietary standard—the liability of a warehouseman. A comparison of the two standards of care readily reveals at least three important differences. To establish tort liability in respect of a local agency's governmental activities, there must be proof: (1) that public property was in a "dangerous or defective condition"; (2) that the local agency had "knowledge or notice" of such condition; and (3) that such knowledge or notice existed in the *particular department* of the local agency which was "authorized to remedy the condition". This is quite different from the duty of a warehouseman to maintain his premises in safe condition.

The finding that this activity was governmental therefore makes intelligible the finding that there was no obligation to provide a safe place for the goods. But, since neither the operation of a dock nor a water system is governmental activity, the finding is as demonstrably in error as anything in the record.

Since this error may well explain the more basic error, that *no duty* existed to maintain a safe dock, it is but the more serious.

The prejudicial and reversible nature of an error in testing conduct by the inapplicable standard of care, was recognized by the Court in

Maragakis v. United States, 172 F. 2d 393 (C. A. 10th, 1949).

In that case, the Court reversed trial court judgments in an auto accident case, and the trial court was directed to assess damages and enter judgment accordingly. The Court said, at page 395:

“The trial court, of course, has the right and duty to judge and appraise human conduct and behavior as applied to factual circumstances, and we are not warranted in overturning its appraisal of the facts when judged by the applicable standard of care, unless we are convinced that its judgment is clearly erroneous. We think, however, in this case that the trial court misconceived the standard of care by which the negligence of the Government driver is to be judged, and in so doing failed to correctly appraise the facts in the light of the legal duty.”

To sum up again, the City's duty was to keep its premises in repair; the peculiar limitations applicable to governmental liability do not apply.

III.

Defendant Did Not Keep Its Premises in Repair. The Court Erred in Failing to Find That This Constituted Negligence; and in Finding to the Contrary. (Specification of Error No. 8.)

(a) Preliminary.

The defendant's position, we believe, is that of an ordinary warehouseman, who holds out a safe place to receive merchandise. We then come to the next question: What did the defendant do to provide the type of place he held out to the public?

Here is the testimony.

(b) The Physical Layout.

Berth 59 is a part of the facilities of the Harbor of Los Angeles at San Pedro. The pier on which Berth 59

is located has two buildings. The building nearest the pier end is 1,800 feet long, which is divided by fire-proof bulkheads into three rooms called transit sheds, each shed being 600 feet in length [R. 422]. The transit shed at Berth 59 is the center part of the building. Sheds for Berth Nos. 58 and 60 are at each end of the building.

The western side of the transit shed at Berth 59 faces the water, and has the usual dock facilities. The other side faces on Signal Street, which runs the length of the pier. On the Signal Street side, there is a raised loading platform which extends a few feet towards the street. The platform has a concrete floor supported by earth contained by a concrete bulkhead, and which drops approximately four feet to the street.

Underground and approximately ten feet east of the west curbline of Signal Street, there is a ten-inch water-main operated by the Water Department of the City [R. 178]. Parallel to that ten-inch main, in the street, but closer to the transit sheds, the Harbor Department of the City has an eight-inch cast iron main [R. 179]. The eight-inch main is connected in three places with the ten-inch line [R. 179].

On each of the three lines leading from the ten-inch Water Department line to the eight-inch Harbor line, there is a Hershey check valve with a meter attached for measuring the amount of water used [R. 184-186].

The eight-inch main feeds into each of the berths by way of two service laterals coming off the main [R. 183]. In the case of Berth 59, these service laterals are about a hundred feet long and they pass under the loading dock and the transit shed itself. The pipe beneath the loading platform on the land side of Berth 59 was

underground, and approximately seven to eight feet below the level of the transit shed floor [R. 150]. This pipe failed [R. 148].

(c) The Occurrence of Damage.

The damage to plaintiff's bags of coffee stored in the transit shed at Berth 59 occurred on or about March 12, 1956. The shed had been closed up sometime between 6:15 and 6:30 p.m. on March 11, 1956 [R. 118]. There was no guard or inspector there at night [R. 119]. Sometime during the night, the pipe burst at a point approximately beneath the door leading from the loading platform into the shed.

The escaping water was forced up through the dirt fill under the shed and loading dock floor, and apparently flowed through an opening between the loading dock floor and the transit shed foundation inside the building [R. 149]. Some of the water flowed out over the top of the loading dock into the street, and some of the water flowed down into the center of the transit shed [R. 149].

Mr. Sebastian Miretti, employed by Outer Harbor Dock and Wharf Co. as a gear foreman, arrived at Berth 59 at 5:50 a.m. on March 12, having been summoned by two customs officers who had discovered water in the area of the transit shed at Berth 59. Mr. Miretti summoned the fire department at about 6:00 a.m., and the water was shut off at about 6:45 a.m. [R. 117].

The escaping water had undermined the dirt fill, and subsequently the surface of the shed floor collapsed and dropped approximately four to six feet [R. 149]. The damage complained of resulted.

(d) Testimony re Corrosion of Cast Iron Pipe.

The experts were in agreement that the failure of the cast iron pipe in question was caused by graphitic corrosion.

They were also in agreement as to the general nature of graphitic corrosion. Graphitic corrosion is a form of electrolysis. Cast iron is composed primarily of iron and carbon. In the presence of an electrolyte such as water and any of the salts which are present in earth and water to varying degrees, a small battery is formed between each of the small particles of carbon and the adjacent iron. As the current flows the iron goes into solution in the electrolyte, leaving the carbon in its original position. The process does not change the shape or contour of the pipe, but it has the effect of weakening the pipe so that it ruptures. Rupture may take place immediately, or some time later. Once corrosion has gone through the thickness of the pipe, however, the pipe is unsafe, although it may be some time, perhaps even several years, before a serious rupture occurs, since there remains a graphite pipe.

The pipe which burst was standard cast iron bell and spigot, eight-inch water pipe with a wall 9-16" thick [R. 150]. It was made with a sand cast lining and is called sand cast pipe, or sandmolded, cast iron pipe [R. 247]. In the process of manufacturing such pipe, molten sand forms a very hard skin on the surface of the pipe. If that skin is broken while being transported or by being hit with a shovel, rolling off a truck or having a rock drop on it, the skin is broken and after installation corrosion starts at the break in the lining [R. 248, 340].

Injury to the skin of such cast iron pipe could occur at any time after its manufacture [R. 249]. This pipe was installed in 1914 [R. 146]. In 1914, it was "common" [R. 250] or as expressed by another expert it was "usual" [R. 340] for such pipe to acquire nicks and dents on the surface from ordinary handling, so that there was a high probability of corrosion starting somewhere along each length of pipe, because of the presence of such a nick or dent [R. 250]. Once corrosion starts, the rate of corrosion depends on the type of soil [R. 248]. Under ideal (non-corrosive) conditions, cast iron pipe may last as long as one hundred and fifty years. Under adverse conditions, life may be as short as five to ten years.

Very little was known about corrosivity of soil in 1914, when this pipe was installed [R. 260]. But knowledge developed rapidly thereafter. An enormous amount of literature on corrosivity was published after 1940. A substantial amount of literature was published between 1920 and 1940, and particularly by the National Bureau of Standards at Washington, D. C. Some of this work was done by the City of Los Angeles, itself [R. 285, 332, 333].

Mr. Robert R. Ashline, a corrosion engineer, employed by the Water Department of the City since 1924, had by May, 1938, published findings in the American Water Journal of the American Water Works Association concerning corrosion. His charts in that publication showed that poorly protected or unprotected cast iron pipe in corrosive soils in Los Angeles had a life expectancy of only *ten to twenty years*, and sometimes even less [R. 277]. The effect of the development of this fund of information has been to cause the discontinuance of installation

of cast iron pipe in areas (such as this one) characterized by severely corrosive conditions, unless given a protective covering (which this pipeline did not have) [R. 260, 261].

Mr. Ashline testified that since 1935 the Water Department has had a practice of determining the corrosivity of the soil along the route pipe will be laid [R. 283]. In severely corrosive soil, the Water Department generally uses cement asbestos pipe [R. 260]. If, however, pressures are high, protected cast iron pipe is used. A coal tar enamel is placed on the outside of the pipe [R. 261].

Similarly, Mr. Frank E. Alderman, another of the City's experts, testified that since 1937 it has been the better engineering practice to protect cast iron pipe installed in highly corrosive soil [R. 470].

The existence of this problem, in general terms at least, was known to the Harbor Department.

Mr. Carrol M. Wakeman testified that he was familiar with the existence of corrosion in cast iron pipe prior to March 12, 1956, and that he was aware that such corrosion was most common in soils containing chlorides commonly found near the ocean [R. 236]. There was no evidence, however, that the Harbor Department had obtained the full information that was "freely available" to it from the Water Department [R. 278].

(e) Evidence Concerning the Corrosivity of the Soil at the Area in Question, and the Probable Life of the Pipe in Question.

The evidence was without conflict that the soil in the vicinity of the break was highly corrosive.

Mr. James F. Brennan, a mechanical engineer and consultant on depreciation problems, employed for many years by the Pacific Gas & Electric Company in San Fran-

cisco, testified that he subjected three samples of soil taken from beneath the slab at Berth 59 to the Corfield corrosivity test and found the corrosivity index average for the three samples to be 6.5. He testified that on the Corfield scale, an index of 2 to 3 is bad soil; that 3 to 4 is very bad soil; and that an index of 6.5 is an extremely bad soil [R. 334-336].

Similarly, Mr. John F. Drake, a chemist and metallurgist, called by plaintiff, had made several hundred tests for the presence of salt and materials over a period of ten years. He examined soil removed from the defective section of pipe which had been cut out, and tested it for the presence of chlorides and sulphates. He found a considerable amount of sodium chloride (salt) [R. 205, 206].

In Mr. Drake's opinion, the quantity of chlorides present in the sample taken from the defective piece of pipe was much larger than would be found in ordinary city water [R. 213].

Mr. Drake has examined another sample of soil somewhere in the general area of Berths 58, 59 and 60 and found it also to be heavy in chloride and sulphates [R. 208].

The City was aware of the corrosivity of this soil as early as 1941. A report entitled "Progress Report of Studies of Graphitic Corrosion of Cast Iron" [Ex. No. 29], written by Mr. Robert E. Ashline and Mr. William E. Kirkendall in March 1941 for the Water Department, reported, among other things, on several corrosivity tests of soil samples taken from the soil in the Signal Street area (which is immediately adjacent to this dock). One such sample showed the soil to be a type then known to cause graphitic corrosion of unprotected cast iron pipe. The report states that graphitic corrosion "*has been par-*

particularly troublesome in the Harbor District” [Ex. 29 p. 81], and that “under conditions conducive to severe graphitic corrosion, *cast iron has one of the worst records for complete deterioration and failure of any of the structural materials ordinarily used in pipe line construction.*” [Ex. 29, p. 8.]

Mr. Ashline testified that the Water Department, sometime subsequent to 1935, but many years prior to 1956, became aware that the soil around Berth 59 and surrounding area was severely corrosive, because it contained a good deal of salt [R. 247, 292].

Commencing in 1935, the Department of Water & Power prepared maps indicating the relative corrosivity of the soils in Los Angeles, including the Harbor area. The map attached to one of the City’s answers to interrogatories [Ex. 28-A], shows that the soil at the pier on which Berth 59 is located was characterized as highly corrosive—having the severest rating for corrosivity shown on the chart [R. 243-246].

The first series of soil tests by the Water Department of the soil in the Signal Street area were made in 1946, and more were made in 1949 and 1952, all of course, several years before the failure [R. 288].

One of plaintiff’s experts, Mr. Brennan, testified that in his opinion, complete graphitization in certain places on the sand-molded, cast iron pipe laid in this soil could have been expected within 25 years from its installation, [R. 338-339] that is, by 1939. He testified that about two-thirds of all failures of unprotected cast iron pipe in a corrosive environment such as exists at Berth 59 would occur between the ages of 10 and 35 years, with the mean being 25 years [R. 341]. He explained that meant there was only one chance in ten that this particular

pipe would last until 1956 [R. 342, 343]. He further testified that any person interested in corrosion could have known by 1935 that corrosive failure of this pipe was "imminent" [R. 343].

Similarly, the publication of Mr. Ashline in 1938 [Ex. 29] indicated a safe life of from ten to twenty years for cast iron pipe in severely corrosive Los Angeles soil [R. 277].

(f) Known Prior Breaks; Evidence of Prior Failures.

Plaintiff introduced in evidence certain of the City's answers to interrogatories filed in the document entitled, "Additional Answers to Interrogatories Numbered VIII, XIII, XIV, XVI and XVII, Submitted by Defendant City of Los Angeles as Required by Court Order made February 25, 1957." These answers, commencing on line 19 of page 3 of the Answers, state that the Department of Water & Power within the area here involved, one mile inland of the pierhead lines established by the Federal Government at Los Angeles Harbor, experienced failures of cast iron pipe due to corrosion as follows:

[a] Within 1 to 5 years after installation: None.

[b] Within 6 to 10 years after installation: 9

[c] Within 11 to 20 years after installation: 29

[R. 44].

The answers to interrogatories further show that the Water Department, prior to March 12, 1956, had experienced six breaks in its ten-inch line close by Signal Street on 22nd Street, as follows: a pipe installed in 1934 failed in 1940; four pipes installed in 1934 failed in 1941; and a pipe installed in 1934 failed in 1942 [R. 45-52, 280, 281].

In the ten-inch line on Signal Street, the Water Department has experienced only one rupture, and that from a cracked pipe, in 1949 [R. 257].

The City's answers to interrogatories propounded by plaintiff also disclosed that the Harbor Department of the City of Los Angeles, prior to March 12, 1956, had experienced two prior failures of cast iron water pipe due to corrosion *beneath the same building* on two specific occasions: (1) on February 15, 1954, a section of five-inch cast iron bell and spigot water pipe was replaced, due to corrosion, at *Berth 60*, (which is part of the same building as Berth 59); (2) on October 11, 1955, a section of eight-inch cast iron bell and spigot water pipe was repaired, due to corrosion, at *Berth 59* [R. 157].

Over plaintiff's objections the City was permitted to put in evidence a later correction of this answer which claimed that the original answer was in error and that in fact neither of the breaks mentioned was due to corrosion [R. 162-165]. This aspect of the evidence is developed more fully in the portion of this brief dealing with the specification of error made in connection with the admission of such evidence.

In addition, a break due to corrosion in this same eight-inch line occurred in 1926 [R. 435].

(g) Evidence of Contemporaneous Leakage From This System.

The only outlets in this water system were overhead sprinklers and 36 fire hoses in the transit shed, 36 two-inch drain valves and 36 three-fourths inch inspector's test valves. There were no faucets, drinking fountains, toilets or other outlets of any kind [R. 201].

Mr. Berry, previously identified, testified that the piping to the sprinkler systems and the fire hoses are in

plain view; that in the three months prior to March 12, 1956, he had not observed any leakage from any of the above-ground facilities of the sprinkler or fire hose systems; and that he had never observed longshoremen spray water about the premises from the fire hoses connected to this system [R. 297].

Mr. Miretti, previously identified, testified that during his nine years of employment in the area, which included Berth 59 [R. 113, 114] he had not seen any water come from either the sprinkler system or the fire hoses nor had he seen any escaping water in the area [R. 121].

Mr. Brashier, defendant's plumber, testified that inspectors sometimes open the test valves; that longshoremen sometimes open the test valves "out of idle curiosity"; and that he has seen the fire hoses lying on the floor of the shed, wet. However, he did not testify that such conditions had been observed in the several months preceding this failure [R. 446, 447].

Each of the three By-Pass meters, sometimes called detecto meters, located near Berths 57, 58 and 60 on Signal Street, was read by an employee of the Department of Water & Power on January 7, 1956. Two of them were read on February 4, 1956. A third was read on February 9, 1956. And all three were read on March 1, 1956 [R. 218].

There was no evidence that any water was drawn from the 3,300 feet of system serviced by those meters for any reason during the period December 9, 1955, to March 1, 1956. The three detecto meters, however, recorded a flow of 11,576 cubic feet of water through the system during that period [R. 225, Exs. 21-27]. That is an average flow of 139.4 cubic feet per day, for which there was no explanation.

The three detecto meters were equally available for examination by Water Department customers, which, of course, would include the Harbor Department. The Harbor Department, however, did not read these meters at any time [R. 187, 278].

The Water Department rendered meter statements each month to the Harbor Department for each of the three connections. In several cases, these bills included the standard flat rate charge plus an additional charge for water used, based on the meter readings. The bills disclosed this flow for several months prior to the incident giving rise to damage [R. 224, Exs. 21-27].

Defendant's expert, Mr. Alderman, previously identified, testified that graphitic corrosion eventually goes through the thickness of the pipe and gives rise to leaks, which may be large or small. He admitted the existence of a leak in and of itself *is some evidence of possible corrosion* [R. 475, 476]. Mr. Alderman further testified that if you have a leak in a pipe you cannot tell whether the cause is graphitic corrosion or something else until you look at it [R. 476]. He also testified that the presence of moisture around the outside of a pipe would tend to accelerate the corrosive process [R. 471].

Mr. Alderman testified that where a rupture is caused by graphitic corrosion the leak "usually" will develop very fast, "over a period of time, days or *months*", and in this case the rupture "probably" increased in a matter of minutes to a large size break [R. 476]. He testified that the leakage in this case "probably" did not come from the particular rupture here involved. It is of course obvious, however, that smaller leaks along the pipe would be the best possible warning that replacement or an inspection might be needed, against the risk that larger breaks along the pipe line are incipient.

Mr. Brashier, previously identified, testified that he was “almost” positive that the water that went through the meters from January to March did not go out through the particular rupture which caused the damage here involved [R. 444].

Mr. Brashier further testified, however, that the fact that 100 or more cubic feet of water was going through these meters every day, was an indication that something *was seriously wrong* with the system [R. 441].

Mr. Alderman also testified that a leak of 100 cubic feet a day in the system of the size covered by the meters would be *excessive* and that *someone should have gone around to see where the water was going to or where it was coming from* [R. 478]. He conceded that it would have been possible to turn off different parts of the system to see whether or not a leak still occurred and thereby localize the area where the leak was occurring [R. 486]. In other words, it was possible for the City to shut off all the laterals and open them up one at a time, and thereby determine which lateral was defective. No one was of the opinion, or suggested that these leaks should have gone unattended and ignored, as they were.

(h) Evidence as to Maintenance of the Pipe and Opinion.

The City’s actual pattern of maintenance can be very briefly described. It is found (and with this finding we have no quarrel) that “. . . the City adopted a policy of not maintaining, repairing or replacing its buried water pipe lines until some trouble was reported or some evidence of leakage developed” [Finding No. 11, R. 102, 103]. Mr. Brashier also testified that no one in the Harbor Department read the meters which would, if read, have furnished evidence of leakage. Thus, the *only* evi-

dence of leakage which was treated as significant was the actual appearance of water on the surface. There were no other precautions against pipe failure taken!

(i) **Testimony Regarding Desirability of Replacement of the Pipe.**

Mr. James M. Montgomery, a consulting engineer specializing in water works problems, testified on behalf of plaintiff, that the pipe, as a matter of good engineering practice, should have been replaced long prior to 1956 [R. 305]. He testified that the reason for his opinion was that the pipe was not laid under a street where a break would cause mere inconvenience and delays in traffic movement but was under and adjacent to a building and warehouse where goods and merchandise would be subject to damage [R. 305].

More specifically, Mr. Montgomery testified that the pipe here involved should have been replaced as soon as the corrosive conditions of the soil were known, because a leak in cast iron pipe from graphitic corrosion ordinarily does not just leak, it breaks and assumes great proportions [R. 305]. He testified that the area of San Pedro harbor has been known in the engineering trade as a hot area, *i.e.*, a highly corrosive area, since the early 40's [R. 306] and that the pipe therefore should have been taken out some time between 1940 and 1945 [R. 324]. He further testified that a short length of pipe such as the service laterals here involved can be replaced quite economically [R. 305].

There was no contrary testimony, so far as concerns replacement merely of lateral pipes beneath buildings.

However, Mr. Ashline, one of the City's experts, testified that there is no practice generally prevailing in Southern California of digging up water pipes to inspect

them to see if they should be replaced [R. 259]. He added that there is no practice in the Water Department to dig into the ground to look at buried pipe unless it is suspected that something is wrong. He explained that the reason there was no such practice was that all of the pipe would have to be examined, as corrosion does not occur uniformly, for reasons previously indicated, and that therefore the cost of digging up the pipes "would be prohibitive" [R. 259]. Presumably, he referred to the cost of an entire water system, and not merely to laterals beneath buildings. Mr. Alderman's testimony was to the same effect.

To sum up: The evidence was substantially without conflict:

- (a) That this pipe was in highly corrosive soil.
- (b) That cast iron pipe has a bad record in such soil.
- (c) That the laterals extending under the transit shed, one of which failed, could have been replaced at moderate expense.
- (d) That in this soil, such pipe had a normal life of 20 years, which had long since passed.
- (e) That a substantial amount of water had been flowing through this pipe, and no one knew why.
- (f) That leakage itself is evidence of corrosion.
- (g) That, for economic reasons, the City had a policy of doing nothing about this pipe.

We have hitherto detailed the law describing the duty of a warehouseman, which is to take reasonable precautions to provide a safe warehouse. We submit that the facts detailed above show a total default in this respect. The cases cited below expand on the effect of this failure.

(j) **Warehouseman's Burden of Proof.**

Under the cases we have cited, in part I of this argument, the City was under a duty to keep its premises under repairs. On these facts, the proof is without contradiction that the duty was not performed; that on the contrary, in order to save money, a policy of *no* care was adopted.

Where there is proof that a casualty occurred, and no evidence that it occurred *despite* the exercise of due care, a warehouseman is liable for the damage resulting.

Lawrence Warehouse Co. v. Defense Supplies Corp., 164 F. 2d 773 (C. C. A. 9th 1947); *California & Hawaiian Sugar R. Corp. v. Harris County, etc., Dist.*, 27 F. 2d 392 (D. C. Tex. 1928).

(k) **Res Ipsa Loquitur Is Also Applicable.**

Seldom is a situation encountered which fits so neatly and logically into the Doctrine of *res ipsa loquitur* as that which is presented in this case. The applicability of the doctrine to the bursting of water pipes has been recognized repeatedly by the courts of California. In

Juchert v. California Water Service Co., 16 C. 2d 500, 106 P. 2d 886 (1940),

the defendant complained of an instruction given by the court as follows:

“‘I instruct you that when a thing which causes injury is under control and management of a defendant and the accident is such as in the ordinary course of things does not happen if those who have the management use ordinary care, it affords reasonable evidence in the absence of explanation by the de-

fendant, that the accident arose from want of ordinary care. Therefore if you find that the defendant water company had exclusive control and management of its water pipe, and that water was permitted to escape therefrom, then I instruct you that the escaping of said water from said pipe affords evidence in the absence of explanations, that it arose from a want of ordinary care on the part of said water company in the control and management of said pipe.’ ” 16 C. 2d at 513.

In holding the instruction proper, the California Supreme Court (as long ago as 1940) said:

“The courts in this state have often applied the doctrine of *res ipsa loquitur* in cases similar to, though not identical with this. . . .

“Certainly it would not extend the doctrine to say that it is a matter of common knowledge that in the ordinary course of things water mains do not break if those having the management thereof use proper care.

“. . . The doctrine has in fact been applied to bursting water mains in the cases of *Buffums’ v. City of Long Beach*, 111 Cal. App. 327 [295 Pac. 540] . . .

“We therefore hold that the instruction was proper.” 16 C. 2d at 514-515.

In the present case, there was no evidence that the City did anything to prevent the loss. On the contrary, there was evidence and a finding that the City had a policy of doing nothing, until water appeared on the surface. (*i.e.*, a policy of doing nothing until it was too late to prevent damage). There being *no* evidence that

the casualty occurred in spite of the exercise of due care to prevent it, plaintiff was entitled to judgment, for the presumption stands without rebuttal.

(1) **Breach of Duty to Acquire Knowledge.**

In his case, it is conceded that the Harbor Department, which maintained this pipe, did not inform itself either of the corrosivity of this soil, or the weakness of cast iron pipe in such soil [R. 274, 275, 284, 285]. This was so, although the maps and measurements of the Water Department which showed this condition, were available to them [R. 278].

Further, although the Harbor Department used leakage as the sole criteria in making repairs, it did not read the meters showing leakage [R. 187]. There was a leakage in excess of 130 cubic feet a day, enough to show something seriously wrong. We quote the testimony of Defendant's plumber, Charles V. H. Brashier [R. 441]:

"The Court: Would you consider the fact that a hundred cubic feet of water was going through these meters an indication something was seriously wrong with your system?

"The Witness: Yes, sir, if that occurred every day."

The authorities are clear that the City could not, without incurring liability for negligence bury its proprietary, municipal head in the blissful sands of ignorance. Its duty required it to keep abreast of all matters which might affect that operation. Thus, in

Wright v. Southern Counties Gas Co., 102 Cal. App. 656, 667, 283 Pac. 823 (1929),

the court held that one under a duty to use care for which knowledge is necessary cannot escape liability for negligence because of voluntary ignorance, relying upon

Gobrechet v. Beckwith, 135 Atl. 20 (N. H. 1926), where the court had stated:

“Where a duty to use care is imposed and where knowledge is necessary to careful conduct, *voluntary ignorance is equivalent to negligence*.” (Emphasis added.) 135 Atl. at 22.

In the *Wright* case, the court also pointed out:

“. . . If the circumstances are such as to show that the owner [of premises], with reasonable diligence, might have become aware of the peril, or should have known the same, liability attaches. . . . It is also well settled that in actions based on negligence, that what an owner of premises reasonably should have known, he will be held to have known.” 102 Cal. App. at 661.

The extent to which the courts refuse to permit a party to hide under a blanket of ignorance is reflected by this Court’s language in

States Steamship Company v. United States, 259 F. 2d 458, 1957 AMC 2277 (C. C. A. 9th 1957).

There, in Footnote No. 4, the Court was considering evidence on the crack sensitiveness of certain types of vessels, and it commented upon the findings of a 1946 board of investigation convened by order of the Secretary of the Navy to inquire into “The Design and Methods of Construction of Welded Steel Merchant Vessels”, as follows:

“This whole report which had not only been read by Vallet but which must have been required reading

for all persons in the shipping industry having to do with ship maintenance, was sufficient to alert any reader to the necessity of care and caution in the handling of welded steel ships such as the Pennsylvania. . . . In short, it would appear from a reading of this and other available studies on the subject, that a maintenance executive in the shipping industry in the exercise of due diligence should be as concerned about the problems of likelihood of fracture or of crack sensitiveness in this type of vessel as were the experts who compiled these studies.” 259 F. 2d at 467.

The City, therefore, was under a plain continuing duty to acquire knowledge relating to the operation and maintenance of water pipes and then to apply that knowledge to the situation presented.

What then was the “knowledge” which the City should have acquired, and which if acquired and acted upon as it should have been acted upon by a reasonable person, would have protected the City from liability for negligence in this case? The nature and uncontroverted existence and availability of such knowledge is adequately reflected by the following facts established in this case:

- (1) Considerable literature specifically on graphitic corrosion of unprotected cast iron pipe was available long before 1945 [R. 343, 344].

- (2) The soil in the area of Berth 59 was highly corrosive [R. 335, 336].

- (3) By the standards applied since the early 1940’s the subject pipe was “unprotected pipe” insofar as graphitic corrosion is concerned [R. 277, 278].

(4) Long before 1941 graphitic corrosion had been particularly troublesome in the Harbor area, and the Department of Water & Power knew in 1941 that the soil in the Signal Street area was highly corrosive [R. 292, 293; Ex. 29].

(5) The Department of Water & Power, within the general area here involved, had, prior to March 12, 1956, experienced numerous failures of cast iron pipe due to corrosion [R. 43-52, 238-240].

(6) Complete graphitization in certain places on the sand-molded, cast iron pipe laid in the soil in the area of Berth 59 could have been expected within 25 years from its installation, that is, by 1939 [R. 338-339, 401], and any person interested in corrosion could have known by 1935 that corrosive failure of the subject pipeline was "imminent" [R. 343].

In that behalf, we quote the similar testimony, first of the City's expert, Robert R. Ashline [R. 277]:

"Q. (By Mr. Verleger):

Further, Mr. Ashline, you said earlier in Philadelphia they had 150 years experience of life with pipe. Where you have pipe in highly corrosive soil, you do not expect any such life for the pipe, do you?

A. Well, generally not, but there are exceptions.

Q. There are exceptions, but generally you don't. Mr. Ashline, back in May, 1938, you prepared an article in the American Water, Journal of the American Water Works Association, on testing of soils prior to installation of metal pipes, and you prepared some charts on the life of pipe in years in corrosive soils where it is poorly protected, isn't that right?

A. That is poorly protected pipe?

Q. Yes, poorly protected or unprotected pipe in corrosive soils. A. Yes.

Q. *The charts you prepared indicated a life of ten to perhaps twenty years for pipe in such soil?*

A. That's right.

Q. *Is that correct?* A. *Sometimes even less."*
(Emphasis added.)

And, second, that of Plaintiff's expert, J. F. Brennan [R. 401]:

"Q. I want to get it clear, please. What is the testimony about this 25-year situation? A. I said that under the conditions that existed here at Berth 59, Pier 1, it was my opinion that the expectancy from the time of installation to complete graphitization in places, the spots on this pipe, would be 25 years."

(7) Furthermore, if they had read the meters, they would have known that the pipe was leaking at a rate of well over 100 cubic feet per day [R. 440, 441].

(m) **The City by and Through Its Water Department
Acted Negligently.**

Even if it is assumed, *arguendo*, that the Harbor Department was under no duty to inform itself, nevertheless the City, by and through its Water Department, was clearly negligent in not communicating its considerable fund of relevant knowledge to the Harbor Department, which department it knew, of course, was operating pipelines in the area of Berth 59.

The following information undeniably existed in the City's Water Department:

(1) Mr. Robert R. Ashline, the corrosion engineer employed by the Water Department since 1924, knew that for many years prior to 1956 the United States Govern-

ment publications and engineering literature, generally, contained information on corrosion [R. 245].

(2) The Water Department had for a long time been quite cognizant of corrosion problems; long before 1941 graphitic corrosion of cast iron pipe had been particularly troublesome in the Harbor area; and the Water Department knew in 1941 that the soil in the Signal Street area was highly corrosive [R. 245, 292, 293, 374, Ex. 29].

(3) The Water Department knew sometime subsequent to 1935 but many years prior to 1956 that the soil around Berth 59 and the surrounding area was severely corrosive, because it contained a good deal of salt [R. 247, Ex. 28-A].

(4) The Water Department had, within the area here involved, one mile inland of the pierhead lines established by the federal government at Los Angeles Harbor, experienced nine failures of cast iron pipe due to corrosion within 6 to 10 years after installation, and 29 failures of cast iron pipe due to corrosion within 11 to 20 years after installation [R. 43, 44, 238-240].

(5) The Water Department since 1935 determined the corrosivity of soil along the route it laid pipe, and the Water Department knew that in the case of severely corrosive soil, cement asbestos pipe generally should be used [R. 260, 283].

The Water Department, however, hoarded its great fund of general and special knowledge concerning the area of Berth 59 and the problems and dangers of sand-molded, cast iron pipe in highly corrosive soil, and negligently did not share the information with the Harbor Department, although it obviously knew that the Harbor Department maintained pipelines in the Harbor area. All this time it was sending bills showing a steady flow of water

in what was supposed to be an overhead sprinkler system with no such steady flow. Manifestly, in the light of its knowledge concerning the unexplained leakage in the Harbor Department's pipeline system, the Water Department also was negligent in not alerting the Harbor Department to a possible corrosion break in the line.

(n) The Court Erred in Treating the Custom of Municipalities, Founded Upon Economy, as the Standard. Evidence of "Custom" Does Not Justify the Conclusion That There Was No Duty to Maintain. The Evidence of Custom Does Not Meet Either the Defendant's Burden of Proof or the Burden of Rebutting the Presumption Under Res Ipsa. (Specification of Error No. 6.)

The City introduced testimony in the nature of custom evidence, which "evidence" obviously weighed heavily with the court in rendering its decision, for it said in its memorandum opinion:

"If any policy has been adopted by municipalities in California, the policy is the same as that followed by the City of Los Angeles; that is, that after cast-iron water pipe is installed the line is used without inspection or replacement until there are sufficient breaks to indicate the pipe has corroded or has become undependable." [R. 93].

This was, in point of fact, the *only* evidence offered by way of defense.

Does such a custom justify non-maintenance of leaking pipes in soil known to be corrosive, under a warehouse? Does it justify the conclusion of the Findings, that no duty to maintain these buildings, particularly the subject service laterals, in a safe condition existed?

A portion of such testimony was obtained from one of the City's experts, who testified as follows [R. 258, 259]:

"Q. Are you familiar with the practice generally prevailing in Southern California and elsewhere with reference to maintenance of water pipes? A. Yes, I am.

Q. Is there any practice that you know of for digging pipes up to inspect them to see if they should be replaced? A. No, sir.

* * *

Q. There is then, I take it, no practice to dig down into the ground to look at buried pipes unless you suspect something wrong? A. That's right."

The "practice" referred to in that testimony does not support the findings that the City had no duty to maintain the subject service laterals in a safe condition. It is settled that conformity by a party to a general custom with relation to the manner of maintaining certain equipment does not excuse the party unless the practice is consistent with due care.

Complete Ser. Bur. v. San Diego Med. Soc., 43 C. 2d 201, 214, 272 P. 2d 497 (1954);

Polk v. City of Los Angeles, 26 C. 2d 519, 159 P. 2d 931 (1945).

The following quotation from

Sheward v. Virtue, 20 C. 2d 410, 414, 126 P. 2d 345 (1942),

succinctly states the governing principles:

"In *Robinet v. Hawks*, 200 Cal. 265, 274 (252 Pac. 1045), this court said that the doctrine of customary usage *does not apply to the question of legal duty* under the law of negligence, or that the con-

tinuance of a careless performance of a duty would transform a party's negligence into due care. Likewise in *Anstead v. Pacific Gas & Electric Co.*, 203 Cal. 634, 638 [265 Pac. 487], a like contention was answered, with citation of authorities, by the statement that the general practice or customs would not excuse the defendant's failure unless it was consistent with due care. More recently in *Mehollin v. Ysuchi-yama*, 11 Cal. 2d 53, 57 [77 P. 2d 855], this court said that one may not justify a failure to use ordinary care by showing that others in the same business practiced a similar want of care." (Emphasis added.) 20 C. 2d at 414.

It is important to note at the outset that Ashline's testimony deals only with the "practice generally prevailing . . . with reference to maintenance of water pipes". It does not come to grips with the real issue here: the practice with reference to maintenance of water pipes so located as to cause substantial damage to valuable goods in the event of a rupture. Moreover, and of equal importance, the testimony is only that there is no practice to dig pipes up to inspect them; it is not that there was not a practice to replace such cast iron pipe laid in highly corrosive soil at a time when the risk of damage to property was too great to justify continued use of the pipe. The highly relevant character of this distinction is forcefully illustrated by the testimony of Mr. Montgomery, one of plaintiff's experts, who testified that the pipe should have been replaced prior to March, 1956 [R. 304, 305], and who when asked to state the reasons for that opinion, replied:

"The reason I think it should have been replaced is that it is in effect the same as a service line. It

is a line which brings water into the building for fire protection purposes. It is unlike similar cast iron mains laid under the street where a break in the line would simply cause inconvenience, as a rule, and delays in traffic movement. In a building or a warehouse where goods are subject to damage, I feel just a short length of service pipe should be replaced. It can be done quite economically. Knowing the soil is corrosive, I think it should have been replaced.” [R. 305].

This testimony was adhered to on cross-examination [R. 323, 324].

The record in this case discloses an additional reason for rejecting the applicability of the so-called “custom evidence” introduced by the City in purported justification of its custom. The “custom” (if it can be called that) of not digging up water pipe lines until trouble developed, rests on the basis that “it is more economical to pay the resulting damage than go in.” (Brennan [R. 369], describing P. G. & E. practice.) Under the authorities developed in Part IV of this brief, a custom based on pure considerations of economy is not relevant on the issue of negligence. Nor, even if the evidence of custom lacked this deficiency, would such evidence dispell the inference raised by *res ipsa*.

The Court will recall that the *Juchert* case (16 C. 2d 500, 106 P. 2d 886 (1940)) holds that breaks in water pipes do not ordinarily happen in the absence of someone’s negligence; hence that *res ipsa* applies when a break occurs. In view of this holding, it would seem to be the law that just to await breaks, without trying to prevent them, is necessarily negligence. This being the rule, ad-

herence to this utility practice constitutes *prima facie* proof of negligence, which is all the City has given us.

The City was required affirmatively to rebut the inference of negligence which arose under the facts in this case. As stated by the California Supreme Court in *Burr v. Sherwin Williams Co.*, 42 C. 2d 682, 268 P. 2d 1041 (1954):

“It is our conclusion that in all *res ipsa loquitur* situations the defendant must present evidence sufficient to meet or balance the inference of negligence, and that the jurors should be instructed that, if the defendant fails to do so, they should find for the plaintiff.” 42 C. 2d at 691.

So much for the custom. The fact that non-maintenance may be customary does not exonerate it. Is there anything in the fact that non-maintenance is a deliberate economic decision, which prevents liability from arising? This question, as much as anything else, seems to have bothered the Trial Court. We pass to that next.

IV.

The Decision Not to Maintain Should Be Treated as an Election to Accept Responsibility for Damages Rather Than an Excuse. It Was Error to Treat This Practice as an Excuse From Liability. (Specifications of Errors Nos. 5, 7, 8.)

This custom of non-repair was an attempt, for profit, to place the risk of loss solely on the users, not the owners, of the warehouse. Where injury to property, rather than person is the risk, from a strictly selfish point of view it may be cheaper for a warehouseman or a public utility to maintain its property in a dangerous rather than a safe condition. Thus, if the warehouse roof leaks only a little,

the value of a little spoiled merchandise may be less than the cost of a new roof. And therefore, even though the warehouseman is under a duty to exercise due care to keep his premises, he may quite wisely, and quite deliberately leave a leaking roof or a leaky pipe in place.

One then meets the question—How can a deliberate, advised decision, be negligence? This, perhaps more than anything else, seemed to bother the Court.

The Court appears to have felt that the adoption of a deliberate policy of non-maintenance, for reasons of economy, could not constitute negligence, because the decision was not unreasonable from the point of view of the pipe operator, even though the effect was to shift the risk of harm entirely to innocent third parties. Thus, as soon as the practice of non-repair was developed, *the Court raised the question of absolute liability* [R. 369-371]. And, at the conclusion of the case, prior to the commencement of oral argument, the same question was raised by the court [R. 487, 488]. The Court spent a good deal of its opinion discussing absolute liability.

The inquiry concerning absolute liability in a sense, touched close to home. For implicit in a decision not to maintain, where there is a duty to maintain, there must be an assumption of liability.

This was recognized quite explicitly by one of the principal witnesses concerning the custom of non-maintenance. Mr. J. F. Brennan, Depreciation Engineer for the Pacific Gas & Electric Co., explained that the practice in the industry was not to inspect or to replace pipes, even though their estimated life had expired, because to quote the witness [R. 369]:

“We accept those hazards usually because it is more economical to pay the resulting damage than to go in.”

As a matter of common sense, this is not hard to follow. One has a duty; one neglects it because it is cheaper to pay claims than to perform. This is perfectly reasonable, so long as one pays the claims. The only problem is one of legal theory. If it is "reasonable" not to "go in", why then is it negligent and why should one pay claims?

The answer follows from the nature of the standard. Prosser expresses it quite clearly in Prosser, *Law of Torts* (2d Ed., 1955) at 119, 120:

" 'Negligence is conduct, and not a state of mind.' [Quoting Terry, *Negligence*, 1915, 29 Harv. L. Rev. 40.] In most instances, it is caused by heedlessness or carelessness, which makes the negligent party unaware of the results which may follow from his act. But it may also exist *where he has considered the possible consequences carefully, and has exercised his own best judgment*. The standard imposed by society is an external one, which is not necessarily based upon any moral fault of the individual; and a failure to conform to it is negligence, even though it may be due to stupidity, forgetfulness, an excitable temperament, or even sheer ignorance. The almost universal use of the phrase "due care" to describe conduct which is not negligent, should not be permitted to obscure the fact that the real basis of negligence is not carelessness, but behavior which should be recognized as involving *unreasonable danger to others*." (Emphasis added.)

Negligence is behavior which involves an unreasonable risk of harm *to others*. The words "to others" are crucial.

This is a test which requires one to consider *not the cost to oneself, but the hazard to third parties*. The Re-

statement of the Law of Torts, Section 283, Subparagraph d., articulates this principle with definiteness. We quote:

“d. *Reasonable consideration for others and reasonable prudence.* In so far as the conduct of the reasonable man furnishes a standard by which negligence is to be determined, the standard is one *which is fixed for the protection of persons other than the defendant . . .* Where a defendant’s negligence is to be determined, the “reasonable man” is a man who is reasonably “considerate” of the safety of others and *does not look primarily to his own advantage.*” (Emphasis added.)

Analyzed in this light, the deliberate decision on economic grounds, not to care for the goods entrusted to defendant, is by definition a failure to meet the standard. The defendant has looked *exclusively* to his own interest, and ignored completely, the risk to the goods he is bound to protect. This point of view was expressed long ago in California by the decision in,

Redfield v. Oakland C. S. Ry. Co., 112 Cal. 220,
43 Pac. 117 (1896),

where the court upheld the rejection of expert testimony on the general custom as to the number of men used in operating an electric street railway car, stating:

“But, . . . custom may originate *in motives of economy, or the stress of pecuniary affairs*, or in recklessness, and not from considerations based upon the proper discharge of their duty toward others using their cars.” 112 Cal. at 224, 225.

Custom is ordinarily evidence on the question of due care. Under the *Redfield* case, a custom founded on the defendant’s economy and convenience was not such evidence. That is precisely the sort of custom we have in the case now before the Court.

Were it otherwise, the obligation to repair the warehouse roof would cease, if the warehouse were an old one, and repairs unprofitable. The obligation to have good brakes and tires on an old car would vanish, when the car was depreciated to a value less than the cost of the tires and brakes. The standard has to be, as it is, danger to the invitee, not profit to the warehouseman. This being so, a decision not to perform the duty to repair is necessarily a willing (or perhaps unwilling) acceptance of liability.

It is worth noting, before leaving this subject, that this deliberate decision not to perform is as close to an intentional as to a negligent harm.

We all know that a person is deemed to intend the consequences he knows will result from his acts. Thus, the deliberate doing of an act which will, either certainly, or very probably, result in harm, is characterized as wilful misconduct—a sort of semi-intentional tort, for which liability exists under guest statutes, *Walker v. Bacon*, 132 Cal. App. 625, 23 Pac. 2d 520 (1933); against which contractual limitations of liability are invalid, *Donnelly v. Southern Pacific Co.*, 18 C. 2d 863 (1941); and which are not discharged in Bankruptcy, *Ex parte Cote*, 106 Atl. 519, 93 Vt. 10 (1918). The deliberate decision not to maintain seems to fall in this category, for the inevitable result is periodic failures which will certainly cause injury to someone.

Whether this custom of non-maintenance be treated as wilful—as an intentional decision to injure third parties from time to time, because this is cheaper—or as a simple failure to comply with the duty of a warehouseman, is immaterial. In either event, we submit, it is hardly a justification against liability.

V.

Any Determination That the City's Conduct Was Not Negligent Under Principles Applicable to the City Even If It Be Assumed It Was Acting in a Government Capacity, Were Clearly Erroneous. (Specification of Error No. 4.)

Actually, even if it be assumed, *arguendo*, that the governmental standard of care was the applicable standard, the court clearly should have found that the City acted negligently in discharging its duty of care with respect to plaintiff's goods.

The statute which prescribes the controlling standard of conduct for a local agency such as a City when acting in a governmental capacity, is Government Code, § 53051, which provides as follows:

“A local agency is liable for injuries to persons and property resulting from the dangerous or defective condition of public property if the legislative body, board, or person authorized to remedy the condition:

(a) Had knowledge or notice of the defective or dangerous condition.

(b) For a reasonable time after acquiring knowledge or receiving notice, failed to remedy the condition or to take action reasonably necessary to protect the public against the condition.”

The first inquiry, therefore, is whether the pipeline which burst constituted a “dangerous or defective condition”. Where a condition involves an unreasonable risk of injury to the public, the condition is dangerous or defective, under the Public Liability Act.

Hawk v. City of Newport Beach, 46 C. 2d 213, 217, 293 P. 2d 48 (1956).

Here, it is apparent that permitting this pipeline to remain in corrosive soil at a location where if it burst valuable goods would be damaged, involved not merely an “unreasonable risk”, but an ultimate certainty of injury to goods stored in the transit shed. Further, as stated in

Carr v. City & County of San Francisco, 170 Adv. Cal. App. 54, 338 P. 2d 509 (1959):

“The dangerous or defective condition to satisfy this section [Government Code, § 53051] may be found in the general plan of operation.” 170 A. C. A. at 58.

The “general plan of operation” in this case was not to inspect or replace underground pipe until some trouble was reported or some evidence of leakage developed [R. 143, 144, 150]. Nor did the maintenance policy include an effort to determine the reasonable life of the pipe installed beneath Berth 59 [R. 157]. Such deficiencies in the maintenance and operation of the pipeline in and of themselves constituted a “dangerous or defective condition” within the meaning of Section 53051.

Furthermore, it is irrelevant that the installation of this pipeline in 1914 was not in and of itself negligent conduct.

Barrett v. City of Claremont, 41 C. 2d 70, 73, 256 P. 2d 977 (1953).

This was stated in similar terms in

McAtee v. City of Marysville, 111 C. A. 2d 507, 244 P. 2d 936 (1952),

where the court said:

“For it can make no difference whether an inherently dangerous condition is present when the improvement is completed according to plan, or whether

that inherently dangerous situation arises through change of circumstances, which, to the knowledge of the city, renders the design unfit for the continued use being made of the improvement. It is not unreasonable to charge responsible officials of a city with knowledge that conditions have so changed, and that an originally safe plan of improvement has become an inherently dangerous one." 111 C. A. 2d at 513.

The next inquiry is whether the City had the requisite "knowledge or notice" under Section 53051.

The authorities make it clear that the governmental activity standard of care does not require actual knowledge of a dangerous or defective condition before liability can be imposed; it is well established that constructive knowledge of such a condition suffices if the defect is such that it should be reasonably anticipated by the officers in charge, or when reasonable inspection would have disclosed the dangerous condition.

Kirack v. City of Eureka, 69 C. A. 2d 134, 140, 158 P. 2d 270 (1945);

Fackrell v. City of San Diego, 26 C. 2d 196, 206, 157 P. 2d 625 (1945).

As stated in the *Fackrell* case:

"Constructive notice is defined by section 19 of the Civil Code as that knowledge of circumstances 'sufficient to put a prudent man upon inquiry as to a particular fact' where 'by prosecuting such inquiry he might have learned such fact.' The rules governing constructive notice require reasonable diligence in making inspections for the discovery of unsafe or defective conditions. [Citations omitted.] Where

the authorities who have planned and constructed an improvement have knowledge of circumstances which reasonably might be expected to result in a dangerous condition as a natural and probable consequence of the work, such authorities are put upon inquiry, and it follows that it is incumbent upon them to make inspections commensurate in scope with the nature and character of their knowledge and the peril which should be avoided" 26 C. 2d at 206.

With respect to the final requirement of liability under the governmental standard, it is clear that the City, long after 1945 (or earlier), when they were charged with notice of this dangerous condition, [R. 143, 144, 150], failed to remedy the condition or to take any action reasonably necessary to protect the public against the condition. The City continued its "do nothing" policy of waiting for further trouble to appear [R. 157]. Inevitably, appear it did, and plaintiff's goods were damaged as a direct consequence.

VI.

The Court Erred in Admitting Over Plaintiff's Objection and in Failing to Strike From the Record Upon Motion an "Additional" Answer Given by the City to an Interrogatory Propounded to it by Plaintiff Pursuant to Rule 33 of the Rules of Civil Procedure. (Specification of Error No. 9.)

Plaintiff's final specification of error relates to the patent and reversible error committed by the Court's admission in evidence of a so-called "additional" answer given by the City to an interrogatory propounded to the City by plaintiff pursuant to Rule 33 of the Rules of Civil Procedure.

The City's original answer to Plaintiff's Interrogatory No. XIV (b) was put in evidence by plaintiff [R. 156, 157]. It stated in part that the Harbor Department of the City of Los Angeles, prior to March 12, 1956, had experienced a failure of cast iron water pipe due to corrosion on two specific occasions—one approximately fourteen years after its installation and the other approximately fifteen years after its installation: (1) on February 15, 1954, a section of five-inch cast iron bell and spigot water pipe was replaced, due to corrosion, at Berth 60; and (2) on October 11, 1955, a section of eight-inch cast iron bell and spigot water pipe was repaired, due to corrosion, at Berth 59.

Over plaintiff's objection that such evidence was inadmissible in the City's behalf because it was "self-serving" [R. 162, 163], the City was permitted to put in evidence [R. 163, 164] a later and "additional" answer to the said interrogatory, No. XIV (b), which answer was contained in a document, entitled, "Additional Answers to Interrogatories Numbered VIII, XIII, XIV, XVI, and XVII, Submitted by Defendant City of Los Angeles as Required by Court Order Made February 25, 1957."¹

Said "additional" answer claimed that the original answer was in error and that in fact neither of the breaks

¹Although it obviously does not bear upon the merits of this specification of error, it should be pointed out that the Court order made February 25, 1957, did not require the City to restate its answer made to Interrogatory No. XIV [b] solely with respect to the Harbor Department. It, in effect, required only that the answer be supplemented in order that there be a complete answer with respect to The City of Los Angeles in all its departments. [R. 40.] Nor, except in this one instance, did the City's other "additional" answers include information supplied by the answers previously given with respect to the Harbor Department, and these other "additional" answers were subscribed and sworn to only by Mr. Robert R. Ashline of the Department of Water and Power [R. 40-56].

was due to corrosion [R. 163, 164]. After the answer was read in evidence, plaintiff's motion to strike the evidence on the ground that it was "self-serving" was promptly denied [R. 164, 165].

The authorities are unanimous in holding that such evidence is inadmissible on behalf of the answering party because it is self-serving.

Haskell Plumbing & Heating Company v. Weeks,
237 F. 2d 263, 267 (C. A. 9th 1956);

Bailey v. New England Mut. Life Ins. Co., 1 F.
R. D. 494, 495 (S. D. Cal. 1940).

In the *Haskell* case this court specifically so held. In that case plaintiffs acquiesced in the trial court's suggestion that they put in evidence their several answers given to interrogatories propounded under Rule 33. Defendant objected to such evidence. In holding the admission to be clear error, and in reversing the judgment because of the error, this Court said at page 267:

"The rules of evidence would permit answers such as these to be used against the party giving them, but because they are self-serving they should not have been admitted on behalf of these plaintiffs. *Lobel v. American Airlines*, 2 Cir., 192 F. 2d 217, 221. See 4 *Moore's Federal Practice* (1950 ed.) §33.29."

The chief vice, of course, inherent in the admission of such self-serving evidence in behalf of the answering party, is that it admits hearsay evidence.

Caplan v. Caplan, 142 Atl. 121, 127-28 (N. H. 1928);

McCormick, *Law of Evidence* (1954) at 588.

Wigmore supplies a good working definition of the hearsay rule, explaining its benefits, as follows:

“Under the name of the Hearsay rule, then, will here be understood that rule which prohibits the use of a person’s assertion, as equivalent to testimony to the fact asserted, unless the assertor is brought to testify in court on the stand, where he may be probed and cross-examined as to the grounds of his assertion and of his qualifications to make it.”

V. Wigmore on Evidence (3d ed. 1940) at 9.

The prejudicial nature of this improperly admitted evidence is manifest. The City’s original answer to the interrogatory was important additional evidence establishing that the Harbor Department of the City (as well as its Water Department) actually knew that corrosion was occurring in pipes in the area of the pier on which Berth 59 was situated.

It would appear that this additional answer completely destroyed the effect of the original answer, for the court found that paragraph IV of the Third Cause of Action alleging the City knew and had notice of the defective condition of the pipelines to be untrue. [Finding No. 22, R. 105]; and that paragraph V of the Third Cause of Action, alleging the City knew or had notice or should have had knowledge or notice that the eight-inch pipe line was subject to deterioration and failure from graphitic corrosion was untrue [Finding No. 23, R. 105]. Thus, not only did the erroneous admission of this self-serving hearsay evidence affect plaintiff’s theory of liability on principles of negligence applicable to a proprietary activity, but it worked against plaintiff even as to the lower standard of care applicable to a governmental activity.

By admitting this self-serving hearsay evidence on behalf of the City, plaintiff was deprived of the valuable right of probing and cross-examining the declarant as to the grounds for the assertion and of his qualifications to make them.

Conclusion.

It is our belief that, if the Court agrees with the contentions we have made herein, that a proper order would be to direct the entry of judgment for plaintiff. We say this because it seems to us clear that further trial would add no additional illumination. Both the City's obligation, and their inactivity with respect thereto, are not disputable. The City's policy of non-maintenance is established by its own witnesses. Assuming that it was under an obligation to provide a reasonably safe place for plaintiff's goods, it would seem that liability should follow without question.

Respectfully submitted,

PHILIP K. VERLEGER,
JACK T. SWAFFORD,
HOWARD J. PRIVETT,
MCCUTCHEN, BLACK, HARNAGEL
& SHEA,

Attorneys for Appellant.

October 15, 1959

Appendix A.

EXHIBITS OF RECORD

<u>Exhibit Number</u>		<u>Page of Record</u>		
		<u>Identified</u>	<u>Offered</u>	<u>Received</u>
Plaintiff's	1	111	419	419
	21	225	223	225
	22	225	223	225
	23	225	223	225
	24	225	223	225
	25	225	223	225
	26	225	223	225
	27	225	223	225
	28	240	240	240
	28-A	241	241	241
	29	373	374	374
Defendant's	B	121	423	423
	C	121	—	—
	G	202	202	202
	G-1	209	216	216
	G-2	216	216	216
	G-3	459	459	459
	I	251	255	256
	K	265	266	266
	N	404	405	406
	O	423	423	423
	P	423	423	423
	Q	424	423	424
	R	424	424	424
	S	426	427	427
	T	429	487	487
	U	430	432	432



No. 16388
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

GRACE & Co. (Pacific Coast), a corporation,
Appellant,
vs.
THE CITY OF LOS ANGELES, a municipal corporation,
Appellee.

APPELLEE'S BRIEF.

ROGER ARNEBERGH,
City Attorney,
ARTHUR W. NORDSTROM,
Assistant City Attorney,
C. N. PERKINS,
Deputy City Attorney,
WALTER C. FOSTER,
Deputy City Attorney,
400 City Hall,
Los Angeles 12, California,
Attorneys for City of Los Angeles, Appellee.

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TRIPPET, YOAKUM, STEARNS & BALLANTYNE,
By F. B. YOAKUM, JR.,
458 South Spring Street,
Los Angeles 13, California,
Of Counsel for Appellee.



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No. 16388

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GRACE & Co. (Pacific Coast), a corporation,

Appellant,

vs.

THE CITY OF LOS ANGELES, a municipal corporation,

Appellee.

APPELLEE'S BRIEF.

Preliminary Statement.

Appellant's "Statement of the Case" and its version of the evidence throughout its brief are so incomplete and incorrect, and its treatment of the evidence so contrary to settled principles governing presumptions, inferences and inferences in favor of the findings, that Appellee is obliged to submit its "Statement of the Case"¹ Rather than interrupt the continuity of Appellee's Brief by referring to the many misleading and inaccurate statements in Appellant's Brief, Appellee will set forth the proven facts in detail.²

¹*Cf. United States v. Hill Lines*, 175 F. 2d 770, 771 (5th).

²The facts stated are those which support the trial court's findings as commanded by Rule 52(a); see Appendix A, pp. 1 to 5.

Statement of the Case.

The case was submitted for decision upon the Second Amended Complaint [R. 57], and the answer of City of Los Angeles to the Amended Complaint [R. 8] as implemented by a stipulation that new matter in the Second Amended Complaint was deemed denied except as admitted or affirmatively alleged in the answer to Amended Complaint [R. 80, 99-100]. Originally, other parties were involved, but during the trial they were dismissed by stipulation [R. 99-100, 233-235].

The case was tried to the Court, which rendered its opinion ordering judgment for defendant (168 Fed. Supp. 344). Subsequently the Court signed Findings of Fact, Conclusions of Law and Judgment [R. 99].

On March 12, 1956, and for many years prior thereto, the Harbor Department of the City (a virtually autonomous department)³ operated a transit shed at Berth 59, Pier 1, at Los Angeles Harbor [R. 100]. Pier 1 extends southerly and seaward from 22nd St. about 2,400 feet into the harbor waters. In the middle of Pier 1 was Signal St., and to the west were Berths 57 to 60. Westerly of these berths was the East Channel of the harbor. The location of these berths and the orientation of various structures to Signal St. as of March 12, 1956, are delineated on Exhibits I and U [R. 251-256; 430-432].

Early in the morning of March 12, 1956, an 8 inch cast iron pipe burst, flooding the floor of the transit shed at Berth 59 and damaging coffee in the shed, presumably owned by Appellant [R. 103]. This pipe was installed between 1914 and 1916 by the *Harbor* Department. It was buried about 9 to 10 feet underground and under

³See Appendix B, pp. 7 to 8.

a concrete loading dock, which was covered with a compacted dirt fill [R. 105]. The pipe burst as a result of graphitic corrosion [R. 465].

Continuously since 1914 there had been maintained under Signal St., commencing northerly of 22nd St. and extending to the southerly tip of Pier 1, a 10 inch water main operated by the Water and Power Department of the City, another autonomous department.⁴ This 10 inch line consisted of 5,244 feet of cast iron pipe which was laid by the Water Department in 1914. The Water Department had had no failures in this pipe from corrosion between the time of its installation in 1914 and March, 1956. The Water Department's line was the same type of pipe as the Harbor Department's which burst [R. 256-258; Ex. K].

Paralleling the Water Department's 10 inch main is an 8 inch main installed and maintained by the Harbor Department. This main commences about 200 feet south of 22nd St. and continues southerly thereon to 200 feet north of the south end of Berth 60; the 8 inch Harbor Department main is connected at three places with the Water Department's 10 inch main [R. 179]; the 10 inch main supplies the 8 inch line with water [R. 182].

It was stipulated that the sole purpose for which this 8 inch main and the system served by it was used was for fire prevention [R. 183], and the Court so found [R. 101]; the water in this system was not even used for toilets, washrooms or drinking fountains [R. 435].

At each of the three connections between the 10 inch main and the 8 inch main there was a check valve through

⁴See Appendix B, pp. 7 to 8; this department is hereafter called the "Water Department."

which a large flow of water could pass. Bypassing each check valve was a $\frac{3}{4}$ inch Detector meter installed for the purpose of detecting a small flow of water in the event someone tried to steal the water or use it for other than fire prevention purposes. These detector meters belonged to the Water Department and were read by it—not by the Harbor Department [R. 185-187]. There were many laterals or service leads from the 8 inch main into the various buildings located on Pier 1, all of which are shown on Exhibit U. The detector meters are indicated on Exhibit I by the markings “A-2,” “A-3” and “A-4” [R. 255]. The pipe that burst was the more northerly of the laterals leading from the 8 inch main to Berth 59 [see Ex. U].

The loading platform under which the pipe burst was 3 or 4 feet above the level of Signal St., had a concrete floor, and was on the street side of Berth 59. It was *not* in or under Berth 59 [R. 188-189, 390].⁵

Immediately upon locating the leak, Brashier (the Harbor Department’s plumber foreman) removed the damaged section of pipe and inserted a new section. He inspected the remaining pipe in the area and found it was good. The removed section was about 6 or 7 feet long; it was soft, as the iron had been removed from it, and there was a hole in it about the size of one’s hand [R. 190-194; 434].

From 1919 until the time of the break there had been no changes or alterations in the lateral leading off the 8 inch line into Berth 59 [R. 428]; the hole in the burst

⁵Throughout Appellant’s Opening Brief (pp. 2, 4, 11, 17, 42, 43, 54, 55) it is incorrectly asserted that the pipe which burst was inside or under the transit shed at Berth 59.

pipe was on the down side and, if one had dug up the earth and exposed the pipe halfway, he would not have been able to see the hole [R. 433].

Prior to this break, there had been but one corrosion failure of Harbor Department pipe in the area, which occurred about 1926 [R. 435]. It was under a warehouse designated as "Municipal Warehouse No. 1" on Exhibits I and U [R. 436]. There was no evidence whether this was a graphitic corrosion failure, or a corrosion of some other type [R. 449]. At the date of the bursting, the Harbor Department maintained in excess of 55,368 linear feet of 6, 8 and 10 inch underground cast iron water pipe, of which 8,298 feet had been installed in 1917 or prior thereto; the pipe in question was installed in 1916 [R. 424; Ex. S]. In this 40 year period the only corrosion break in the entire system of more than 10 miles of pipe was the one under Municipal Warehouse No. 1 [R. 436-437].

The Harbor Department's pipes were sand cast pipe, which was the approved technique at the time they were made; in the process of manufacturing, the molten sand forms a hard, protective skin surface. If the skin is broken in transit or in installation, corrosion may start, but ordinarily such damage would not be observable by the naked eye [R. 247-249]. There is no evidence that the pipe in question was damaged either in transit or installation [R. 438].

There is no connection between the Water Department and the Harbor Department; the Water Department exercises no jurisdiction over pipe installed by the Harbor Department [R. 253, 258]. None of the Water Department studies as to soil corrosivity were reported to the Harbor Department, and leaks in Water Department lines

were not reported to the Harbor Department [R. 262, 284-285].

There is no known practice to dig up water pipes for the purpose of inspecting them to see if they should be replaced; the cost would be prohibitive; merely digging a test hole and finding a pipe in good condition would be no indication of what the pipe might be like a few feet removed; there is no practice to dig up water pipe unless something is suspected to be wrong; in the absence of trouble, pipes are replaced only because of obsolescence, *e.g.*, the pipe is too small and the fire department wants more water in the area, or there has been a section of line with recurring leaks. The City of Philadelphia has cast iron pipe in use for 150 years and it is not being dug up to be replaced. When this pipe was installed in 1914 it was the best pipe on the market; at this time very little was known about soil corrosivity [R. 259-265]. The Water Department never digs up or discards pipe merely because it is in corrosive soil, in the absence of trouble [R. 271].

The burst pipe was examined and, although it had lost its iron content and strength, *it retained its full wall thickness and shape*; visual inspection would not disclose that graphitic corrosion was occurring [R. 261-262; 273].

Graphitic corrosion does not develop a uniform pattern; even in the same area one spot will be corrosive and another will not; even inland a high degree of corrosivity is experienced in some areas [R. 262-263]. Exhibit 28-A shows high corrosivity in some areas adjacent to the harbor but in other areas abutting Fish Harbor corrosivity is either mild or slight.

Although one can tell that graphitic corrosion has occurred by scratching the pipe or hammering on it, to de-

termine whether a pipe line has been subjected to graphitic corrosion it would be necessary to open the entire line and examine *every inch of the pipe* because there might be corrosion one place, yet ten inches away the pipe would be all right; to examine it carefully one would have to look at it on top, bottom and both sides. Even in highly corrosive soil, cast iron sometimes lasts for many years [R. 276-277].

Although the Water Department had corrosion failures on 22nd St., such pipe was laid in 1934 and was a *metal molded* pipe—not a sand cast pipe as was the Harbor Department's pipe. A sand cast pipe holds up much better than metal mold. The Water Department's 10 inch line down Signal St. was also sand cast [R. 288-289].

Appellant's witness, Montgomery, testified hypothetically⁶ that in his opinion the pipe involved should not have been permitted to remain in a highly corrosive soil from 1914 to 1956 [R. 304-305]. He said the situation was unlike a cast iron main laid under a street, where a break in the line would cause mainly inconvenience; but that in a building or warehouse where goods might be damaged he felt a short length of pipe should be replaced, and it should have been replaced as soon as they knew it was in a corrosive soil. Pipe subject to graphitic corrosion doesn't leak; it just breaks and a flooding occurs [R. 305].

On cross-examination, Montgomery testified he knew of a "hot" area in Belmont Shores where they had a great deal of trouble from graphitic corrosion and they replaced it with a different pipe [R. 306]. When he worked in

⁶He incorrectly assumed that the burst pipe was *under* the transit shed [R. 304-5].

San Diego, where there were “hot” areas, he did not know of any pipe being torn up. He was advisor to the City of El Centro and the City of Las Vegas, where they had “hot” areas, but he did not advise them to replace their pipe; he didn’t know the age of it [R. 308-309]. In Las Vegas, when a corrosion break occurred, they replaced enough of the pipe to remove the bad part but left the rest in. He thought this was consistent with sound practice [R. 311]. His only experience with the pipe in this action was when one of Appellant’s attorneys, a couple of weeks before the trial, pointed the area out to him and he identified the place of the break as being:

“ . . . where the elbow on the cast iron service line bent up to come into the building, where it came under the floor and up into the building.”⁷ [R. 312.]

He did not know whether the burst pipe was a vertical or horizontal piece [R. 312]. He did not know how deep the pipe was buried [R. 312], and he thought a pipe would not be laid deeper than four or five feet [R. 314] and, if the pipe had been in the street rather than near the loading shed, he would not think of replacing it [R. 315]. He felt the danger point was where the pipe went under the loading dock; he would not replace it if the escaping water would not be likely to cause damage but would just wait until it broke [R. 315-6]. He has never replaced or recommended replacing a water main in the street, but only when it was going into important buildings—meaning by that, “where the water comes into a building” [R. 316].

A graphitized pipe doesn’t leak—there is a deluge when it gives way [R. 316]. In only one instance has he ever

⁷Of course, this is not where the pipe broke.

recommended the removal of a pipe before a breakdown [R. 317]. He thought the pipe that broke was close to the wall of the transit shed, probably within eight inches [R. 321], but admittedly he had not seen the shed until just before trial [R. 312, 321]. And the break was not under the building but under the loading platform [R. 390]. He conceded that cast iron pipe is erratic in its behavior; he has known of cast iron pipe in "hot" ground that gave no trouble for many years and others that graphitized very rapidly; in many instances they just take out an affected section and replace it with a new pipe and get many more years service, *and that is the general practice*. He also said he had managed a water company that had cast iron pipe that was laid in "hot" soil in 1852, and they replaced short lengths of it but the rest held up quite a while and some of it was still in service at the time of the trial [R. 326-327].

On cross-examination, he conceded that the Las Vegas main that was replaced was just enough new pipe to take care of the defective section that was removed; this was not a service line but was a main in the street [R. 327]. *He knew of no instance where service lines were replaced*; there was one instance where he recommended it, but his recommendation was not followed [R. 328].

Appellant's witness, Brennan, testified that in June, 1956, he took three soil samples underneath Berth 59 and a sample from Signal St. [R. 334]. He made "Corfield" corrosivity tests of these samples. [R. 335.] The samples taken from inside and under Berth 59 had a high corrosivity index [R. 336]. He estimated the life of cast iron pipe in soil having a high corrosivity as 25 years, but conceded there is no precision to such an estimate

and that there is a great variance in the soils and the action of pipe to them [R. 339].

On cross-examination, Brennan admitted he knew of cast iron *gas* mains that had been in service for as long as 50 years [R. 352]. As to pipes in service for more than 50 years, he had assigned a remaining life value to them for rate making purposes [R. 353]. He also admitted that by his direct testimony he did not mean to infer that because pipe had been in the ground 25 years he would junk it [R. 354]. In working for P. G. & E. with gas pipes, he found they had to be safer than water pipes as escaping gas is more dangerous [R. 358]. In the San Francisco Bay area the P. G. & E. cast iron gas mains had been in service a very long time, some of them going back as far as 1890 in areas favorable to the survival of cast iron [R. 358-359]. For rate making purposes, even pipe installed in 1890 is ascribed a remaining life value [R. 361-362].

During the past 12 or 14 years he was employed by the P. G. & E. as Supervisory Evaluation Engineer [R. 366]. In all his experience in replacing cast iron water pipe, Brennan knew of no instance where it was replaced merely because of passage of time and prior to a breakdown [R. 368-369]. This is particularly true of water systems where the pressure is low and the hazards are not high. With water pipe, he has never recommended replacement before there was an indication of failure, because it is too costly to dig the pipe up and replace it [R. 369].

Never in his experience have they dug up a water pipe to look at it in advance of an indication of trouble, such as water in the street or on adjacent property [R. 378-379]. He knew of no instance where a rate making body

ever permitted a public utility to claim as short a life as 25 years for cast iron water pipe, or that merely because pipe had been in the ground for 30 years it was valueless and should be replaced for rate making purposes, or that the pipe would be charged off as valueless merely because of the passage of time [R. 382].

He also admitted that every small earthquake disturbance causes leaks in joints [R. 386].

The earth samples he took from Berth 59 were taken through a hole in the floor of the shed where the concrete had collapsed, about three or four feet below the surface [R. 389].⁸

On Brennan's test No. 2 (which he did not mention on direct examination) he got a very low corrosivity rating. He attempted to explain this by saying that the sample furnished for test No. 2 was not the right quantity of soil; *but this sample was a soil quantity given him by plaintiff's attorneys just two days after the break.* It was not until after he made this test that he told plaintiff's attorneys he could not use the sample [R. 392-393]. This sample was taken from the very area where the pipe burst [R. 394]. The sample from out in Signal St. also had a low corrosivity rating [R. 394]. All five of his test sheets were introduced in evidence as Exhibit M. The test from the Signal St. sample, which also had a low corrosivity rating, he considered not to be indicative of the soil at the place where the pipe burst; the higher readings from inside the shed he considered indicative because they were closer [R. 398].

It is clear from the foregoing why the trial Court ignored Brennan's testimony concerning his soil tests.

⁸The burst pipe was 9 to 10 feet below the surface [R. 105].

Brennan knew that the Internal Revenue Service prepared a Bulletin F showing, for tax purposes, the life of cast iron pipe. Bulletin F [Ex. N] allows for tax purposes an average life of 75 years for 8 to 10 inch cast iron pipe [R. 403-405].

He also stated he had heard that cast iron pipe in Versailles, France, had been in service more than 100 years [R. 407].

He "explained" why the Water Department pipe on Signal St. had lasted since 1914 without a corrosion break [R. 256-258] by saying he thought the soil in the street was less corrosive than the soil under Berth 59, and that perhaps drainage conditions were different or more favorable [R. 408-409]. He did not know where the soil conditions changed which would cause them to get a high or low corrosivity reading [R. 409]. He also conceded that if he made a soil test and found a Corfield reading of 2.8 on Signal St. and no surface graphitization of the pipe, he would *not* recommend it being replaced even though it had been in for 25 years [R. 409-410]; and his answer would be the same with reference to the lateral off of the 8 inch fire line [R. 410]. In examining a pipe, he would be satisfied just to see the top or upper half of it for a longitudinal length of about two feet [R. 411]; he would also tap it with a chisel and measure the extent of graphitization; then would form a judgment as to the probable expectancy of the pipe [R. 412].

This pipe was the best made at the time and it completely retained its shape, which is one of the characteristics of graphitic corrosion [R. 416].

Even with recently installed new pipe, breaks occur from corrosion in as short a time as two years [R. 417].

The City's witness, Alderman, a Civil Engineer experienced in design, maintenance and installation of cast iron water mains and systems [R. 454 *et seq.*], made a pressure test of a portion of the 8 inch pipe that was removed from the area where the break occurred. He built a watertight chamber of a small section of the pipe and subjected it to water pressure [Ex. G-3; R. 459]. The pipe did not fail until subjected to a pressure in excess of 500 pounds per square inch; it then ruptured longitudinally [R. 47]. This was more than 7 times the normal working pressure, which was about 65 pounds per square inch [R. 461-463].

Graphitic corrosion is a type of electrolysis in which a circuit is set up in the cast iron and the iron is removed, leaving only a carbon shell. One cannot tell by looking at the surface whether pipe has been subjected to graphitic corrosion [R. 465-466].

In his opinion, reasonable waterline maintenance practice would *not* require digging up cast iron pipe in a highly corrosive soil from time to time, before any trouble had developed in the line; there was no method by which a person could from the surface detect trouble in a buried pipe; the only way to inspect it would be to uncover it and look at it. It is hazardous to uncover any appreciable amount of water pipe because there is a risk of disturbing it structurally and setting up dangerous stresses [R. 466-467].

When this pipe was installed, cast iron was the best pipe available [R. 467]. Cast iron water pipe has been in service in many instances for over 100 years [R. 468]. Many water systems in Southern California have installed unprotected cast iron pipe in corrosive areas [R. 470].

On a corrosion break the leak usually develops very fast [R. 476]. In a fire line consisting of 5,000 to 6,000 feet of pipe, containing a leaded joint every 10 feet and 36 test valves which were turned on periodically to check the system, a leakage of 100 cubic feet of water per day for several months prior to the break *would not be any indication that the pipe which gave way was leaking*. In fact, a system with that many valves would be unusual if it did not leak [R. 477].⁹

Detector meters merely show that water has gone through them. They are not an accurate measure of water consumption [R. 479-480]. In a dead end system, such as the one here in question [R. 445] where the pipes have no outlet, water can flow back and forth through the detector meters due to changes in air pressure at the end of the sprinkler line; and a dead end line would be subject to considerable variation in pressures as valves were opened [R. 480-481].

A reading of 100 cubic feet of water per day through the detector meters would *not*, in prudent practice, require digging up the buried pipe; in the absence of water coming to the surface you would not know where to start to look for a leak [R. 481-482]. The readings on Exhibits 25, 26 and 27, showing water consumption through the detector meters for the three months immediately preceding the time of the break, do not indicate that any water was escaping from the pipe at the place where it burst on March 12, 1956. These readings were not constant,

⁹This was the system here involved [R. 221-2; 440-7].

but were variable—sometimes increasing, at other times decreasing—whereas a leak at the break would develop so rapidly as not to show on the meters [R. 483-484].

Brashier, the City's plumber foreman, when asked his opinion as to whether any of the water going through the detector meters in the few months preceding the break was escaping through the place where the break occurred, said:

“I would almost positively say no. A condition of this kind, it is my experience one second it is together and the next second it is gone.

“The Court: It would be your opinion this 100 cubic feet a day escaped from the system at some other location?

“The Witness: Yes, sir, not through this hole.”
[R. 444.]

Summary of Argument.

I.

PLAINTIFF FAILED TO PROVE THE CITY WAS NEGLIGENT IN THE MAINTENANCE OF ITS PIPE LINE.

II.

THE PIPE LINE SYSTEM WAS USED SOLELY FOR FIRE FIGHTING PURPOSES—A GOVERNMENTAL FUNCTION—AND PLAINTIFF FAILED TO ESTABLISH THE REQUISITES FOR LIABILITY, EVEN ASSUMING THAT NEGLIGENCE EXISTED. ACCORDINGLY, GOVERNMENTAL IMMUNITY ATTACHES.

III.

THE EXCULPATORY CLAUSE IN THE CITY'S TARIFF EXONERATES THE CITY FROM LIABILITY EVEN THOUGH NEGLIGENCE WERE ESTABLISHED.

IV.

THE ADMISSION OF THE CITY'S "ADDITIONAL" ANSWER TO PLAINTIFF'S INTERROGATORIES WAS NOT ERRONEOUS OR PREJUDICIAL.

ARGUMENT.

I.

Plaintiff Failed to Prove the City Was Negligent in the Maintenance of Its Pipe Line.

In considering the trial court's Findings, we bear in mind the provisions of F. R. C. P. 52(a) and the presumptions, intendments and inferences which we are entitled to draw from the record in view of such Findings. Consistent therewith, we ignore conflicts in the evidence.¹⁰

We do not agree, as frequently asserted by Appellant, that the Harbor Department adopted a "do nothing" policy concerning inspection and replacement of its water lines. It is true that the trial court's opinion, removed from its context, uses the phrase "do nothing" with respect to inspection—but not as to "replacement" (166 Fed. Supp. 348). And this was not in the Findings, which are not to be impugned by expressions in opinions.¹¹ Appellant's oft-cited statement that the City's decision not to dig up or inspect buried pipe was based upon "economy" (App. Op. Br. 64, 67, 69) or "economic grounds" (App. Op. Br. 71) is not supported by the record. The policy is stated in Finding 11 [R. 102].

Appellant cites no authority discussing the duty imposed upon a person maintaining underground water mains to inspect or replace the same. But there are many such decisions and they are in accord in declaring that no duty rests upon the owner of a buried water main to dig it up to inspect it (merely because of its age) prior to some indication that the main is failing. The leading

¹⁰See Appendix A, pp. 1 to 5.

¹¹*Plastino v. Mills*, 236 F. 2d 32, 35 (9th); *Brooks Bros. v. Brooks Clothing*, 5 F. R. D. 14, 17 (D. C. Cal.).

California case is *Williams v. Long Beach*, 42 Cal. 2d 716, involving damage caused by the escape of gas from defendant's main. The trial court found that damage resulted from the escaping gas but that the City was not negligent. The main was installed about 27 years before the accident. In affirming, the Supreme Court held:

“* * * There was testimony that no practical method was available to test the amount of strain on the pipe without taking it completely out of service and that there was no known practice of testing such pipes for strain while they are still in place.” 42 Cal. 2d 718.

That *res ipsa loquitur* may be applicable to a situation such as this becomes immaterial after the cause of the accident has been satisfactorily explained to the trier of fact. This is made clear in the *Williams* case and in *Hardin v. San Jose City Lines*, 41 Cal. 2d 432, 437, where the Court said:

“* * * This [*res ipsa*], of course, does not mean that the burden of proof shifts from plaintiff to defendant. The defendant has merely the burden of going forward with the evidence, that is, the burden of producing evidence sufficient to meet the inference of negligence by offsetting or balancing it.”

Decisions from Massachusetts, South Dakota, Michigan, Pennsylvania, Ohio, Virginia and New Jersey, are to the same effect, namely, that absent proof of faulty installation there is no duty upon a city or utility maintaining a water line to dig up its streets periodically for the purpose of inspecting or replacing water pipe prior to the time that trouble becomes known.¹²

¹²These authorities are set forth in Appendix C, pp. 9 to 15.

Appellant has never suggested any practical method of testing or inspecting buried pipe. As said by the trial judge:

“* * * Plaintiff admits, however, there was no reasonable manner in which the line could be adequately inspected, other than to excavate the soil along the pipe line and make physical inspection thereof. * * * It would be necessary to excavate around the entire pipe to locate a corroded area. An examination of the upper half of the pipe would not be sufficient because graphitic corrosion could manifest itself on the lower portion of the pipe and not on the top or sides. To make complete inspection it would be necessary to remove the earth from beneath the line. The removal of earth from beneath the pipe would remove its support, putting a strain upon the pipe itself, and might cause a sinking or bending of the pipe, occasioning damage more extensive than the corrosion itself.” 168 Fed. Supp. 344, 348-349.

Appellant's discussion of “Contemporaneous Leakage” (App. Op. Br. 50 *et seq.*) ignores the evidence explanatory of the leakage. There is not a scintilla of evidence that any of the water registered by the detector meters escaped through the pipe at the point where it burst. Hence, leaks in other portions of the system would not be a notice or warning to look for a leak at the place where this break occurred. The check valves which the detector meters bypassed served fire lines from the north end of Berth 57 to the south end of Berth 60, a lateral to a water tank on the roof of Municipal Warehouse No. 1, a lead into the garage between Berths 57 and 58, a lead from service connection No. 8849 easterly across Signal St. to the building called “AUTO REPG,” two leads extend-

ing easterly across Signal St. opposite Berth 59 into and under Municipal Warehouse No. 2, and two leads opposite Berth 60 extending easterly across Signal St. into and under Municipal Warehouse No. 1. And underneath Berths 58, 59 and 60, there were six 5 inch lines parallel to and connected with the 8 inch main.¹³ Water was drawn from this system frequently as a result of turning on check valves, leaks in joints and surges. The plumber foreman testified as to the various ways water would be registered by these meters [R. 440-447]. Appellant read into evidence the City's answer to Supplemental Interrogatory No. 7 wherein the causes for the flow were explained by saying there were 6,000 feet of underground pipe, 600 leaded joints, and that the causes were minor leaks in the joints, leaks in the 36 two-inch drain valves which are sometimes turned on, 36 $\frac{3}{4}$ inch tests valves, and when testing occurred a flow might be registered, improper seating of the alarm valves, surge in the pressure causing the alarm valves to open, and longshoremen or other persons "skylarking" will turn on the fire hoses for pleasure [R. 221-222].

Appellant's own witness testified that flow of water through these meters would not indicate a leak in the pipe that burst because the pipe would not give way gradually but that a piece would come out of it and a "general flooding takes place" [R. 305]—"You have a deluge" [R. 316].

There is no pattern to the meter readings. The Water Department records [Exs. 25, 26 and 27] show that as far as 1953 fluctuating meter readings obtained. Sometimes they are substantial; at other times trivial; some-

¹³These leads or laterals are all shown on Exhibit U.

times nothing. There is nothing in the record to show that the pipe in question was dripping or dribbling quantities of water in the months immediately preceding the time it burst or that one should have known by reading the meter statements that this pipe was in a dangerous condition.

Appellant asserts (App. Op. Br. 54) that short lengths of pipe, such as service laterals, could be economically replaced. The service laterals were estimated by Appellant's witness, Montgomery, to be approximately 100 feet in length [R. 322] and he thought there were 3 of them [R. 323]. In fact, there were at least 14 of them [Ex. U] extending in both an easterly and westerly direction from the Water Department's 10 inch main.

Appellant cites (App. Op. Br. 56) *Lawrence Warehouse Co. v. Defense Supplies Corp.*, 164 F. 2d 773 (9th), and *California & Hawaiian Sugar v. Harris, etc.*, 27 F. 2d 392 (D. C., Tex.), to support its assertion that where an accident occurs and there is no evidence that it occurred despite the exercise of due care, a warehouseman is liable. These cases (the facts of which are not cited) have no bearing on this record. There is no evidence that the City was a warehouseman; nor is there evidence of any contractual relation between the City and Grace; nor was the burst pipe in or under the transit shed.

In the *Lawrence Warehouse* case, there was a contract between an admitted warehouseman and plaintiff for the safekeeping of its goods. There is no such status shown between Appellant and the City. Further, the court found that Lawrence Warehouse Co. had been guilty of negligence arising from the use by its agent of an acetylene torch which gave rise to the fire that caused the damage.

In *California & Hawaiian Sugar Corp. v. Harris County*, 27 F. 2d 392 (D. C., Tex.), the court found that defendant was negligent in that it had negligently laid a floor of insufficient strength to withstand weights which it knew or should have known would be placed upon it, as a result of which the floor subsided and broke a water pipe. There, again, negligence was expressly found, viz., negligent installation and maintenance of a floor. Again, we note there is no evidence that Appellant enjoyed the status of a bailee with respect to the City.

It is argued (App. Op. Br. 58) that Water Department maps were available to the Harbor Department. Literally, this is correct, but it ignores the testimony that there was no liaison with or exchange of information between the Water Department and the Harbor Department; the evidence was precisely to the contrary [R. 253, 258, 262, 284-285]. The testimony quoted by Appellant (App. Op. Br. 58-62) is removed from its context and ignores other testimony explanatory thereof. We have stated the context fairly and completely in Appellee's "Statement of the Case" (*ante*, pp. 2-15).

The contention that the knowledge and extracurricular studies of Ashline, a Water Department employee, concerning corrosion are chargeable to the Harbor Department is unrealistic and intolerable when dealing with a complex multi-departmentalized instrumentality such as a metropolitan city. Such contention was made and rejected in *Stein v. City of Newark*, 52 A. 2d 66 (N. J.), where plaintiff told the Building Department of the leakage but such information was not called to the attention of the Water Department until sometime later. In granting a motion for directed verdict, the Court held:

"As I have already indicated, the plaintiff . . . notified the Building Department . . . that his

building was in a dangerous condition . . . However, it would seem to me that this is immaterial as there is no evidence that notice of the leak in the water pipes of the City was given to the Water Department. Further, there is no presumption that notice to the Building Department of a leak in the water line, under the evidence in this case, was by the Building Department communicated to the Water Department where it was no part of the Building Department's duty to receive and report such complaint to the Water Department." 52 A. 2d 68.

Appellant asserts (App. Op. Br. 64) error in treating the custom of municipalities as establishing a criterion of negligence or the lack thereof. This, again, is an unwarranted interpretation of the record. Appellant quotes from the trial court's opinion and states that the policy regarding buried pipe was the only evidence offered by way of defense. This is not the case; there was much evidence offered to show that it could not be told by visual observation whether pipe had graphitized; that the only way one could tell would be to completely expose the pipe along its entire surface, and that this was uneconomical, unrealistic, unsafe and impractical. The court never ruled or found (and the City has never contended) that custom was conclusive as to whether due care had been exercised; but it is contended that it is relevant evidence of the standard which should obtain.

Appellant *has never suggested* what more should have been done to constitute due care. It is clear there was no practical method of testing the pipe without completely taking the entire line out of service. It is clear that ordinarily cast iron pipe has a life far in excess of 42 years, and the practice throughout the country (as evidenced

by the many decisions cited in Appendix C) of leaving mains in service until trouble can be reasonably anticipated or a danger signal appears, is considered to be consistent with ordinary standards of care. A water pipe is not a dangerous instrumentality so as to require one to be constantly on the alert against injuring the property of another. Water pipes, mains, valves and joints frequently leak, but damage is the exception rather than the rule, particularly with respect to pipes buried 9 feet underground.

As stated in *Williams v. Long Beach*, 42 Cal. 2d 716, 718:

“* * * There was testimony that no practical method was available to test the amount of strain on the pipe without taking it completely out of service and that there was no known practice of testing such pipes for strain while they are still in place.”

In *Anderson v. County of Santa Clara*, 174 A. C. A. 171 (Sept. 30, 1959), which involved a claim of negligence in burning of brush cuttings, it is held:

“* * * There was evidence that this method of burning was standard approved practice. * * * Such evidence would support an inference of non-negligence upon the part of the county employees.”
174 A. C. A. 173.

The rule is stated in 2 *Witkin, Summary of California Law*, pages 1764-1765, as follows:

“Evidence of custom or usage in a business or industry, i.e., the practice of others similarly situated or performing similar acts under similar conditions, is admissible in negligence cases on the issue of what constitutes due care or negligence under the circum-

stances. * * * However, while the conduct or custom of others is evidence of the nature of a thing or of conduct as safe or dangerous, and is therefore *admissible*, it does not, as a matter of *substantive law*, conclusively establish a legal standard of due care.”^{13a}

Appellant cites (App. Op. Br. 65) *Polk v. Los Angeles*, 26 Cal. 2d 519, which involved failure to maintain proper insulation on a dangerous, high tension electrical line. This line was not buried or covered, but was readily available for inspection. Defendant admitted it took no precaution to protect persons who it should have anticipated might come in contact with it (26 Cal. 2d 529).

Complete Service Bureau v. San Diego Medical Society, 43 Cal. 2d 201, and *Sheward v. Virtue*, 20 Cal. 2d 410 (App. Op. Br. 65), are clearly distinguishable on their facts. Neither holds that evidence of the practice of others in the industry is not a proper matter to be considered in determining the presence or absence of negligence.

Appellant cites (App. Op. Br. 67) the testimony of its discredited witness, Brennan, that the P. G. & E. would rather pay damages than replace its pipe [R. 369]. Brennan was not connected with either the legal or claims departments of P. G. & E., and he was in no wise qualified to speak on the matter of handling P. G. & E. damage claims. Concerning this, the trial judge said:

“That might be a policy of the P. G. & E. I never knew P. G. & E. to be a Santa Claus”. [R. 488].

^{13a}Accord, Prosser on Torts (1941 ed.) 239-240.

In any event, there is nothing of record to show that the P. G. & E. "policy" was typical of the practice generally prevailing.

Appellant fails to discuss any of many decisions, both in California and throughout the United States, which expressly hold that the mere passage of time in respect to installation of underground water pipe does not create negligence on the part of the operator of the pipe line prior to some notice or knowledge that a defect existed—none of which was shown here insofar as the Harbor Department was concerned. And the entire experience of the Harbor Department and the Water Department, insofar as the pipes on Signal St. and Pier 1 are concerned, was one of satisfaction, with no breaks from graphitic corrosion during the prior period from 1914 to 1956 with the exception of one break from corrosion (type not defined) occurring in 1926 under Municipal Warehouse No. 1 [R. 256-258; 436].

Appellant cites (App. Op. Br. 71) *Redfield v. Oakland, etc., Ry. Co.*, 112 Cal. 220. The facts are wholly dissimilar; the operator of a one-man streetcar jumped off the car while it was moving to change a trolley switch; the operator fell down and was unable to catch up with his car, as a result of which it ran away and killed plaintiff's wife. In such factual setting, it was held that opinion evidence that one-man car operations were not negligent was inadmissible, even though other railways operated one-man cars. The operation of a moving vehicle and the maintenance of a pipe buried 9 feet under-

ground are hardly analogous. In view of the many buried pipe cases available, it would seem that the *Redfield* case has no bearing on this case.

And the argument (App. Op. Br. 72) that the facts here are analogous to a decrepit roof, or worn automobile brakes or tires, wholly misses the point. Such matters can be readily inspected and their condition ascertained. Here, the evidence is conclusive that there was no practical method of testing the pipes without opening the entire line, exposing it both top and bottom, breaking the cement platform and digging a hole about 10 feet deep; even then, mere visual inspection would not suffice because a pipe subject to graphitic corrosion retains its size and contour; every inch of pipe would have to be tested. The trial court said:

“The removal of earth beneath the pipe would remove its support, put a strain upon the pipe itself, might cause a sinking or bending of the pipe, occasioning damage more extensive than the corrosion itself.” 168 Fed. Supp. 349.

The factual showing is even stronger than that in *Williams v. Long Beach*, 42 Cal. 2d 716, 718, *ante*, p. 17.

II.

The Pipe Line System Was Used Solely for Fire Fighting Purposes—a Governmental Function—and Plaintiff Failed to Establish the Requisites for Liability, Even Assuming That Negligence Existed. Accordingly, Governmental Immunity Attaches.

It was stipulated that the line was used solely for fire fighting purposes [R. 183], and the Court so found [R. 101]. Undisputed testimony also established that this was the only function of the system [R. 151; 434-435].

What constitutes a governmental function is stated in *Chafor v. City of Long Beach*, 174 Cal. 478, 487:

“* * * Under the theory of the common law, that the municipality is protected from liability only while exercising the delegated functions of sovereignty, the governmental powers of a city are those pertaining to the making and enforcing of police regulations, to prevent crime, to preserve the public health, *to prevent fire*, the caring for the poor and the education of the young; and in the performance of these functions all buildings and instrumentalities connected therewith come under the application of the principle.”

In *Talley v. Northern San Diego Hospital Dist.*, 41 Cal. 2d 33, operation of a county hospital is held to be a governmental function, the court saying:

“* * * Neither is the profit or nonprofit phase of the activity engaged in determinative of either a proprietary or a governmental function. * * * The test is whether *the particular activity* in which the governmental agency is engaged at the time of

the injury is of a public or a private nature. The agency may be authorized to act in both capacities.”
41 Cal. 2d 39.

In *Denning v. California*, 123 Cal. 316, plaintiff, night deck hand on a vessel operated by the State Board of Harbor Commissioners, was injured due to negligent failure to properly secure a ladder. The vessel was used in a dual capacity, in the daytime engaging in towing and attending fires but at night engaging only in fire prevention. Plaintiff's injury was at night. In reversing a judgment for plaintiff, the court held:

“* * * But even if it were true that insofar as the duties of the board were those of a wharfinger, and that the liabilities of the State to its employees are or should be the same as that of a private corporation engaged in the same business, it does not follow that the State is or would be liable to the plaintiff inasmuch as he was employed in a distinct branch of the service, viz., the protection against or extinguishment of fires, which, even in the case of municipal corporations, is uniformly held to be the exercise of a purely governmental function; and there is certainly as strong ground for distinguishing between the different functions of the board as there can be for distinguishing between the different functions of municipal corporations, in the exercise of some of which the corporation is liable for negligence, whilst in the others it is not.” 123 Cal. 322.

In *Stang v. City of Mill Valley*, 38 Cal. 2d 486, 488, it was held:

“The determinative question is whether plaintiff's allegations constitute a cause of action against de-

fendant. It is conceded that fire fighting is a governmental function . . . , that in the absence of statute, neither a municipality nor its officers are liable in tort for failure to discharge a duty arising from a governmental function.”

While it may be conceded that the operation of a transit shed is a proprietary activity, it does not follow that the operation of a fire prevention system located outside the shed is a proprietary one. Appellant has cited no case which so holds.

In *Guidi v. California*, 41 Cal. 2d 623, the court emphasized that whether governmental immunity exists *depends on the nature of the activity*—not upon the identity of the subdivision carrying on the activity or the fact that the facility may also be used for some other purpose. The court held:

“* * * Governmental immunity, however, turns on the nature of the particular activity that leads to the plaintiff’s injury, not on the identity of the governmental subdivision * * * or on the fact that the facility in question may also be used for governmental purposes. * * * Thus, in *People v. Superior Court, supra*, 29 Cal. 2d 754, we held that the State Belt Railroad was operated by the State Harbor Commission in a proprietary capacity, although that agency prevented and extinguished fires on the waterfront in its governmental capacity. * * * Similarly, in the present case we are not concerned with the possible immunity of the state from liability for negligence in connection with agricultural and educational activities at the state fair, but only with its claim of immunity for negligence in the course of setting off fireworks and maintaining the horse arena.” 41 Cal. 2d 625.

In that case the court held that setting off fireworks and maintaining a horse arena was a proprietary function; the situation here is precisely the opposite; the injury resulted from a governmental function, namely, the bursting of a fire prevention line; it did not result from negligence in the operation of the transit shed.

Other decisions recognizing this distinction are:

Davoust v. Alameda, 149 Cal. 69, 70;

Ravettino v. City of San Diego, 70 Cal. App. 2d 37, 43;

Rhodes v. Palo Alto, 100 Cal. App. 2d 336, 341.

In 8 *McQuillin, Municipal Corporations* (3d Ed.), page 212, the rule is stated as follows:

“The liability or non-liability of a municipality for its torts does not depend upon the nature of the tort, the relation existing between the city and the person injured, or whether the city was engaged in the management of tangible property, but depends upon the capacity in which the city was acting at the time.’ ”

Appellant cites (App. Op. Br. 39) four out-of-state cases which it contends hold that operation of a water system is a proprietary function where the water is used for a warehouse sprinkler system. We are not dealing with a warehouse sprinkler system, but with a fire fighting system that is used for the general protection of the area [R. 101]. Appellant again abstains from summarizing the facts or quoting from these cases. Appellee has read them and believes they are clearly distinguishable. They might well be ignored for, as held in *Benton v. City of Santa Monica*, 106 Cal. App. 339 (where plain-

tiff was injured on a portion of a municipally operated beach near which was a pier that the City leased out for proprietary purposes):

“* * * Whatever the law may have been declared to be in other states is wholly immaterial. . . . There is nothing in the appellant’s amended complaint showing that the City of Santa Monica was exercising any functions over the portion of the beach belonging to the city, in any proprietary capacity whatever. The fact that other portions may have been leased for revenue purposes, or the fact that the City may have built a municipal pier, tends in no degree to establish any proprietary activity over what appears to be an unleased and open portion of the beach to which the public may have been invited.”
106 Cal. App. 342-343.

Notwithstanding, we will indicate the distinction between Appellant’s cases and the one at bar.

In *Richmond v. Virginia Bond & Warehouse Corp.*, 138 S. E. 503 (Va.), it was held that the operation of a water department for supplying water for domestic and commercial purposes was a proprietary activity and the fact that the water might be used by the water department’s customer for fire fighting did not change the status of the water department (138 S. E. 506). In that case the warehouse company bought the water from the City. Here, the Harbor Department bought the water from the Water Department for the *sole* purpose of fire prevention, and it was the Harbor Department’s water that escaped from the Harbor Department’s pipe. Furthermore, the negligence provided in the Virginia case was the failure of an employee of the water department to

cut off the water (138 S. E. 507). An excerpt further distinguishes the case:

“* * * Such installations, *when not required under police regulations*, are made by municipalities in their private or proprietary capacity. In the instant case, the sprinkler was being installed by the plaintiff [*a private corporation*] for its private protection against fire. * * * It was not installed by the compulsion or at the instance of the City.”
138 S. E. 507.

In our case, ultimate jurisdiction of this fire line was vested in the Fire Department of the City which, under *Los Angeles Charter*, Section 130, had the power and duty to control and extinguish fires and to enforce all ordinances pertaining thereto:

“ . . . within the City of Los Angeles, including the waterfront of the city, and the waters under the jurisdiction of the city, and vessels or structures thereon.”

Section 5703 (F)(1), *Los Angeles Municipal Code* [Ex. O], vests in the Fire Chief supervision over the following fire fighting appliances:

“ . . . (d) Interior and exterior standpipes, *water supplies thereto* and name plates therefor;
. . . (e) steamer connections for sprinkler system, *water supplies thereto*, signs and name plates therefor; . . . ”

And Section 91.0506 of *Los Angeles Municipal Code* [Ex. R] commands that a building such as Transit Shed 59 and having in excess of 12,000 square feet *must* have an automatic sprinkler system. (Berth 59 was ap-

proximately 60,000 square feet [R. 421-424].) Thus, these water mains were maintained and used under compulsion of city ordinances and subject to the superior authority of the Fire Department.

In *Dunston v. New York*, 86 N. Y. S. 562, the City had actual notice for several days that an exposed pipe was leaking and was improperly supported. The opinion recognizes that in a factual setting such as we have here the function would perhaps have been governmental, the court saying:

“If the City maintained a separate water system for the fire department, and the break occurred in such a pipe, it may be that it could not be chargeable with negligence concerning the construction or maintenance of the same; but that is not this case, and need not be decided. Here the fire hydrants are connected by lateral pipes with the mains which are used for supplying the City and inhabitants with water, and from which the City receives a revenue. It is clear I think that for negligence in not repairing a water main proper, or a service pipe which is used for other than fire purposes, the City would be liable for any damages directly and proximately attributable to such negligence.” 86 N. Y. S. 566.

In *Boyle v. Pittsburgh*, 21 A. 2d 243 (Pa.), the leak had existed for seven weeks and the City had actual notice of it but neglected to inspect or repair. The broken pipe was part of the “regularly constituted water system of the municipality which was used for supplying water. * * * It was all one system.” (21 Atl. 2d 243.)

Here, after the water passed through the check valve as it left the Water Department’s 10 inch line it became

the property of the Harbor Department and was effectively sequestered for all time. It was used for nothing but fire fighting purposes; it was not used for toilets, washrooms or drinking fountains [R. 435].

Blake-McFall Co. v. Portland, 135 Pac. 873 (Ore.), is contrary to California decisions; in addition, there was but one system and it was used indifferently and interchangeably for both selling water and fire fighting. Furthermore, the fire department had *no* control over the system as it did in our case. The court said:

“We are not called upon to decide whether the City would be chargeable with negligence in the construction of a separate water system to be used exclusively for fire protection.” 135 Pac. 874.

Notwithstanding the stipulation, the Finding and the uncontradicted evidence that this line was used for nothing but fire fighting purposes, and the circumstance that the line was not inside a warehouse where plaintiff's goods were located but in a street, buried under a loading dock, Appellant argues that liability exists by virtue of *Government Code*, Section 53051, which imposes liability upon a municipality:

“. . . if the legislative body, board, or person authorized to remedy the condition: (a) Had knowledge or notice of the defective or dangerous condition.

“(b) For a reasonable time after acquiring knowledge or receiving notice failed to remedy the condition or to take action reasonably necessary to protect the public against the condition.”

This statute (Public Liability Act) is in derogation of the common law rule of immunity and is strictly construed against claims asserted against the municipal body.

In *Hoel v. City of Los Angeles*, 136 Cal. App. 2d 295, 303-304, the court held:

“ . . . the statute is in derogation of the common law rule of no liability for malperformance of a governmental function, and is to be strictly construed.”

To the same effect:

Whiting v. City of National City, 9 Cal. 163, 165;
Allen v. City of Los Angeles, 43 Cal. App. 2d 65,
68.

One asserting the statute has the burden to prove the elements necessary to impose liability. In *Dineen v. San Francisco*, 38 Cal. App. 2d 486, 491, the court held:

“* * * It is the general rule that in actions under the Public Liability Act it is incumbent upon the plaintiff to plead and prove the dangerous and defective condition of the property, knowledge on the part of some officer or agent of the defendant who possesses the power to rectify the condition, and neglect to repair within a reasonable time after notice.”¹⁴

One invoking the statute must prove that notice of the defective or dangerous condition has been brought to the attention of the “legislative body, board or person authorized to remedy the condition,” and a failure to remedy the defect within a reasonable time after acquiring such

¹⁴Although the Second Amended Complaint alleges delay in repairing promptly, this was abandoned at the trial in the face of the showing that, within 45 minutes after the Harbor Department learned of the break, the plumber foreman dressed, drove from his home to Pier 1, and turned off the water [R. 187-8]. The Court found there was no delay or negligence resulting therefrom [R. 102-3; Findings 10 and 11].

notice. In this case, the “board” authorized to remedy a defect in the pipe was the Board of Harbor Commissioners. Sections 70 and 71 of the *Los Angeles City Charter*¹⁵ created the Harbor Department, and provide that the Department shall be managed by a “board of five Commissioners.” Section 138 vests the Commissioners with “management, supervision and control” of the tidelands; Section 139(g) requires the Commissioners to “maintain and operate” all harbor facilities; Section 141 vests the General Manager of the Harbor Department with supervision and management of “all construction and maintenance work authorized or ordered by the Board.”

Appellant ignores (App. Op. Br. 73 *et seq.*) the requirement that the notice required under the Public Liability Act must be brought to the party having the duty to correct, *i.e.*, the Harbor Department. Notice to the Water Department concerning soil conditions in the area (absent a showing that such was brought to the attention of the Harbor Department) is immaterial as the Water Department is not authorized to maintain pipe under the jurisdiction of the Harbor Department. The Water Department is created by Section 70 of the *City Charter*, and its powers defined in Sections 218-229 thereof.¹⁶ The Charter makes clear in Sections 77-80 that each department has complete autonomy (subject to control of the City Council) over matters committed to its jurisdiction.¹⁷ Section 78 in part provides:

“The board of each department shall have power . . . to supervise, control, regulate and manage the department. . . .”

¹⁵Appendix B, pp. 7 to 8.

¹⁶Appendix B, pp. 7 to 8.

¹⁷Further indication of the independence of these departments is recognized in *Douglass v. Los Angeles*, 5 Cal. 2d 123, 134-5.

Further indication of the autonomous nature of the Harbor Department and the Water Department is found in Section 51(6), which provides:

“The powers and duties of the City Administrative Officer and the provisions of this section shall not extend or apply to the Departments of Water and Power, Harbor, or Airports.”

And the general City budget does not apply to the Harbor Department or the Department of Water and Power, which are given control of their own funds (Sec. 345).

Hoel v. Los Angeles, 136 Cal. App. 2d 295, holds that notice to one city department is not notice to another, within the requirements of the Public Liability law. There, plaintiff was injured because of malfunctioning of an intersection traffic signal. The Police Department had actual notice of the defect, but the authority to repair was vested in the Board of Traffic Engineering Commissioners (now called the Department of Traffic; Sec. 245 *et seq.*, *Los Angeles City Charter*). The holding negates any contention that notice of defects in the pipes of the Water Department, or notice to it of soil conditions in the area, was notice to the City that similar conditions might exist in the pipes of the Harbor Department within the meaning of Section 53051 of the *Government Code*. The court held:

“* * * The knowledge or notice must reach the body, board or person authorized to remedy the condition. * * * Under the evidence heretofore discussed, a police officer not only has no authority to do more than afford temporary protection against a known defect in the signal, but he is instructed to

do no more than that. * * * Authority to take temporary measures to guard against a dangerous or defective condition in an emergency might be attributed to many servants of the city who had no authority to remedy the condition by removing it. But notice to such persons is not the notice the statute prescribes as a prerequisite of a duty to act. * * *

136 Cal. App. 2d 304, 306.

Continuing, the court held:

“ . . . actual notice must be given to one having authority to remedy or to an employee charged with the duty of communicating same to a person having authority to remedy, and notice to any other employee (not charged with such duty) does not count unless actually passed on to the person in authority.” 136 Cal. App. 2d 312.

To the same effect:

Goodman v. Raposa, 151 Cal. App. 2d 830, 834;

Loewen v. City of Burbank, 124 Cal. App. 2d 551, 553.

Appellant argues (App. Op. Br. 73-76): (1) that when a condition involves an unreasonable risk of injury it is a dangerous condition within the meaning of the Public Liability Act, (2) that such dangerous condition may be found in the general plan of operation, and (3) that actual knowledge is not required—merely constructive knowledge—if the defect is one that could be reasonably anticipated. These factual assumptions were all resolved against Appellant.

Again we turn to Appellant's cases and point out their distinguishing features. Preliminarily, it seems that a

water pipe system consisting of over 10 miles of 6, 8 and 10 inch buried pipe, substantial portions of which have been in use since 1917 without any trouble from graphitic corrosion [R. 436; Ex. S], cannot fairly be characterized as constituting a dangerous or defective condition, or a plan of operation that has subsequently become inherently dangerous through changed circumstances of which the City had knowledge. The trial court did not find that the condition here existing involved any unreasonable risk of injury to the public. As said in *Hawk v. Newport Beach* (App. Op. Br. 73), 46 Cal. 2d 213, 217:

“ . . . each case must be determined upon its own peculiar facts.”

In that case the question was whether rocks located in a cove at a bathing beach used by the public constituted a dangerous condition. *It was held to be a question of fact on which reasonable men might differ.*

In *Carr v. San Francisco* (App. Op. Br. 74), 170 A. C. A. 54, the court affirmed a judgment of nonsuit in favor of the municipality as against a claim for injuries suffered by a boy when he tripped over an attendant in charge of a playground merry-go-round.

There are no facts in this record to show that the general plan of operation resulted in a dangerous or defective condition. The operating results over a period of 40 years belie such a claim.

The distinction between *McAtee v. Marysville*, 111 Cal. App. 2d 507, and the case at bar is apparent by the excerpts from the opinion, wherein the court notes that the engineering department of the city (which had jurisdiction of the matter) knew at all times that the sewer line was not designed or intended to operate under pressure

and that the City Engineer knew of the existence of pressure prior to the accident (111 Cal. App. 2d 510, 513)

The facts in *Fackrell v. San Diego*, 26 Cal. 2d 196, are wholly dissimilar. The city had improved a dirt street by spraying road oil on it and on an adjacent dirt curbing, between the dirt curbing and a steep hillside was a 10 foot dirt sidewalk; while spraying the roadway and curb, a portion of the oil was accidentally *but to the knowledge of the Street Superintendent* sprayed onto the dirt sidewalk a width of perhaps 18 inches. The City authorities permitted this coating to remain on the sidewalk; this created the "appearance of a paved sidewalk" (26 Cal. 2d 200). Two months later heavy rains eroded the dirt portion of the sidewalk but left a strip about 30 inches wide next to the curb, which appeared to be intact and usable. The strip included the oiled surface portion of the sidewalk. Actually, the rains had undermined the earth under this thin oiled strip and, when plaintiff walked on it, the surface crust gave way and she was injured. The City Street Maintenance foreman conceded there was bound to be considerably more erosion on a hill than on a level ground, and that the unimproved dirt sidewalk would be particularly subject to erosion (26 Cal. 2d 201-202). The trial court made the following finding:

"* * * [the City] had improved the street and sidewalk by grading the sidewalk and street and oiling the same and that by reason of said work the sidewalk and street was [*sic*] left in a condition which was inherently dangerous; that said inherently dangerous condition was known to the defendant.
* * *" 26 Cal. 2d 202.

How different are these facts from the Findings and the record here. There is no evidence or finding that the Harbor Department either created or knew of an inherently dangerous condition. It is a far cry from a sidewalk visible to all and a pipe buried 10 feet underground, which has performed perfectly for many years. The statement regarding constructive notice must be considered in the light of these wholly different facts and the Findings of the trial court in our case.

A factual situation more analogous to that involved here is found in *Cheyney v. Los Angeles*, 119 Cal. App. 2d 75. Plaintiff at night walked down steps to a beach maintained by the City; it was dark and there were no lights or fires; a stairway led from a parking lot to the beach and had 23 steps with a handrail extending to the last few steps. The last step was 29 inches from the sand according to measurements made two days after plaintiff's injury; plaintiff took the last step, fell to the sand and was hurt. The supervisor of the beach area, whose duty it was to protect visitors and keep the stairway in repair, had no knowledge that the sand level was at any time below the bottom level of the bottom step of the stairway, although the waves and tides varied the sand level as much as five feet within a period of twenty-four hours. Affirming a judgment of nonsuit, the court held:

" . . . before a defendant municipality may be charged with constructive notice it must have existed for a sufficient length of time and be sufficiently conspicuous or notorious to give rise to the inference that defendant had knowledge thereof. * * * In the instant case there is no evidence that the alleged defective condition was either conspicuous or notorious, or as to how long it had existed." 119 Cal. App. 2d 77.

Here there is no evidence that the defect in the pipe was conspicuous or notorious; nor is there any evidence as to how long the condition which led to its bursting had existed.

In *Dineen v. San Francisco*, 38 Cal. App. 2d 486 (involving collapse of a courtroom chair), it was held that the doctrine of constructive notice does not apply except to patent defects or defects arising from original negligent installation, the court saying:

“Appellant next contends that constructive notice is sufficient under *some* circumstances to impose liability under the Public Liability Act. This is undoubtedly the law. * * * Under these cases, long continued existence of a patent defective condition may establish constructive notice thereof. These cases go no further, however, than to hold that if the evidence shows that the dangerous condition is long continued and patent the governmental agency cannot successfully contend that it was not aware of it. In the present case, it is contended that the defect is one which would have been discovered had the respondent exercised reasonable care in inspecting the seats. The cases do not support such extension of the rule. Moreover, not only is this theory not pleaded in the complaint upon which the action went to trial, but it was refuted by the evidence. The evidence produced by plaintiff demonstrated that the accident occurred by reason of the fact that a nut on a bolt that supports the seat of the chair had become unscrewed. There was not one word of testimony as to how long this condition had existed, nor that the nut and bolt were in such a condition that a reasonable inspection would have disclosed the condition.” 38 Cal. App. 2d 491.

III.

The Exculpatory Clause in the City's Tariff Exonerates the City From Liability Even Though Negligence Were Established.

As a second and third affirmative defense, the City pleaded an exculpatory clause contained in its tariff and alleged that plaintiff was aware of and subject to the provisions thereof, although the agreement between the City was with Grace Line, Inc., a separate corporation, as preferential assignee of Berth 59 [R. 10-14]. In view of its other findings, the trial court made no finding concerning the matters alleged in the second and third defense [R. 106, Find. 27].

Notwithstanding that the trial court made no finding on these defenses, it is submitted that the judgment can be sustained upon the basis of such defenses.

Item 535(b) of the City's tariff [Ex. B] provides:

“Neither the Board nor the City shall be responsible or liable in any manner or degree for any loss or damage to any merchandise or other property of any description stored, handled, used, kept or placed upon, over, in, through, or under any wharf or other structure or property owned, controlled or operated by the Board or the City occasioned by or on account of pilferage, . . . seepage, leaky containers, . . . leakage or discharge from sprinkler system, . . . or from any cause whatsoever, except to the extent that responsibility and liability shall be, regardless of above limitations, absolutely imposed by operation of law.”

It is settled in California and elsewhere that an exculpatory clause of the type here involved, although strictly construed, is valid and enforceable.

Stephens v. Southern Pacific Co., 109 Cal. 87, 89;

Fields v. Oakland, 137 Cal. App. 2d 602, 608-609;

Inglis v. Garland, 19 Cal. App. 2d (Supp.) 767, 773;

Werner v. Knoll, 89 Cal. App. 2d 474, 475-476;

R. H. Macy & Co. v. Fall River, 83 N. E. 2d 880, 881 (Mass.);

Bigelow v. Boston, 149 N. E. 540, 541 (Mass.);

Manius v. Housing Auth. of Pittsburgh, 39 A. 2d 614, 615-616 (Pa.).

Presumably, it will be pointed out by Appellant that it did not sign the preferential berth assignment but that it was signed only by Grace Line, Inc. [Ex. D]. However, if Appellant's use of Berth 59 was with the consent of the Harbor Department such use was authorized only because of the preferential berth assignment agreement. If Appellant was not using it pursuant to such agreement, its use was unlawful and it was a trespasser or gratuitous licensee. In either event, the City would owe no duty to Appellant except to abstain from active negligence.

Item 1235 of the Tariff [Ex. T] makes it unlawful to use the berth without an assignment or other permission. This section reads:

“It shall be unlawful for any person to . . . use . . . any berth, wharf, wharf premises, or other area under the jurisdiction of the Board without first securing an assignment or other permission. . . .”

There is nothing in this record to show Appellant's right to use the transit shed unless it was by virtue of the preferential berth assignment between the City and Grace Line, Inc.

In *Palmquist v. Mercer*, 43 Cal. 2d 92, plaintiff, who was on premises either as a licensee or trespasser, was injured due to a defect in a trestle maintained thereon by Union Oil Company. The trial court granted a nonsuit and, in affirming a judgment of dismissal, the court held:

“Nor does it appear that Union Oil Company breached any duty owing to plaintiff by reason of its maintenance of the trestle. In exercising its right to maintain the trestle, Union Oil Company was acting by express permission of the Flood Control District, like the holder of a franchise. * * * As such, its status was akin to that of the legal possessor of property, having no greater duty or obligation than the landowner with respect to the condition of the property in relation to a person coming on the property either as a trespasser or licensee. * * * In other words, Union Oil Company was using the premises as a matter of right as against plaintiff's use by sufferance; and whether plaintiff be viewed as a trespasser or a licensee, the Union Oil Company owed him only the duty of refraining from wanton or wilful injury. * * *” 43 Cal. 2d 101-102.

The same rule is applied to a social guest in one's home in *Free v. Furr*, 140 Cal. App. 2d 378, 383.

IV.

The Admission of the City's "Additional" Answer to Plaintiff's Interrogatories Was Not Erroneous or Prejudicial.

Finally, Appellant urges (App. Op. Br. 76-80) that prejudicial error was committed by the reading in evidence of the City's additional answer to an interrogatory propounded by plaintiff.¹⁸ This additional answer was read into evidence by plaintiff—not by the City—although it was read over plaintiff's objection. However, plaintiff voluntarily read the original answer to Interrogatory No. XIV(b) [R. 156-157] which stated that the Harbor Department prior to March, 1956, had had two failures of cast iron water pipe caused by corrosion. Long prior to the trial, the City voluntarily filed a correction to this answer, explaining that the two failures resulted from a sheer and a break in a leaded joint [R. 39].

Appellant's contention, irrespective of its merit, is answered by the circumstance that in addition to the answer to the interrogatory concerning which complaint is made there was positive testimony by the City's plumber foreman, Brashier, that there had been no corrosion failure in this entire Harbor Department pipeline system other than the one at the south end of Pier 1 under Municipal Warehouse No. 1 which occurred in 1926 [R. 435-436]. Appellant had ample opportunity to cross-examine Brashier and such other City personnel as it saw fit. Thus, we may ignore the additional answer concerning

¹⁸This matter is in the Record, pp. 155-165.

which Appellant complains, and there still remains record support for the Court's finding that the City did not know or have notice or knowledge that this pipe was subject to failure from graphitic corrosion.¹⁹ The matter is probably covered by *Thompson v. Baltimore, etc., Railroad Co.*, 155 F. 2d 767 (8th; cert. den. 329 U. S. 762), where the court held:

"* * * The rule, however, is that, in a case tried to the court without a jury, the admission of incompetent evidence does not render the findings erroneous where there is substantial competent evidence to support them. 'The presumption is that the trial court considered only the competent evidence and disregarded all evidence which was incompetent.' " 155 F. 2d 771.

The same rule is stated in *Robey v. Sun Record Co.*, 242 F. 2d 684 (5th; cert. den. 355 U. S. 816), where the court held:

"* * * In any event there was other evidence to the same facts so that if it were error to admit these journals it would be harmless and it is to be presumed that the court disregarded all incompetent evidence. * * *" 242 F. 2d 689.

And in *Lobel v. American Airlines*, 192 F. 2d 217 (2d; cert. den. 342 U. S. 945), the court held:

"Plaintiff was allowed to read to the jury his own answers to defendant's interrogatories about the extent of his injuries. These answers were self-serving and should not have been admitted. * * * Here the error was harmless since plaintiff had already testified directly to the same effect." 192 F. 2d 221.

¹⁹Cf. Rule 61, F. R. C. P.

Further, the matter is not resolved so simply as Appellant asserts (App. Op. Br. 78) by the holding in *Haskell Plumbing & Heating Co. v. Weeks*, 237 F. 2d 263 (9th). In that case, the adverse party did not seek to use a portion of the interrogatories but the answering party sought to use them affirmatively. This was held error not only in view of the fact that the answers were self-serving, but also because the trial court refused to permit the adverse party to cross-examine the answering party (237 F. 2d 266-267).

Appellant ignores the fact that it was the one who originally sought to read the City's answers concerning prior corrosion breaks. It was the City's contention that in view of the fact that plaintiff read one answer on such subject the City was entitled to read any other of its answers which were explanatory or a correction of those read by plaintiff [R. 156, 161-162]. This was what the trial court permitted. Such practice seems authorized by the Federal Rules although Appellee has not found a case specifically in point.

Rule 33 provides:

“. . . and the answers [to interrogatories] may be used to the same extent as provided in Rule 26(d) for the use of the deposition of a party.”

Rule 26(d)(4) reads:

“If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce all of it which is relevant to the part introduced, and any party may introduce any other parts.”

This would seem clearly to mean that if one party elects to read the other party's answer to an interrogatory, the answering party would be entitled to have read an explanation or correction of that answer which relates to the same subject matter. Such procedure seems consistent with fair play and common sense; any witness is entitled to explain or correct a prior answer. This corrected answer was filed July 15, 1957 [R. 56], nearly 15 months before the trial commenced [R. 99]. Plaintiff had ample time to submit additional interrogatories or to take further depositions, if it wished, to ascertain the reason for the corrected answer. It was at no time surprised or deprived of the right to cross-examine any City official or employee. This evidence was admitted during Tuesday morning, the first day of the trial [R. 163-165; 169] and although the trial continued until noon of the following Friday [R. 453; 490], appellant made no request to interrogate any witness concerning the corrected answer.

Conclusion.

In summation and conclusion, the judgment should be affirmed for the following reasons:

1. No negligence has been proved;
2. The burst pipe was used solely for a governmental function, namely, fire prevention, and Appellant has failed to establish facts necessary to make the provisions of the Public Liability Act applicable;
3. The exculpatory clause is operative;
4. Appellant, if not bound by the exculpatory clause, had only the rights of a gratuitous licensee or trespasser

and, in such case, no duty was owed to it except to abstain from active negligence.

Respectfully submitted,

ROGER ARNEBERGH,

City Attorney,

ARTHUR W. NORDSTROM,

Assistant City Attorney,

C. N. PERKINS,

Deputy City Attorney,

WALTER C. FOSTER,

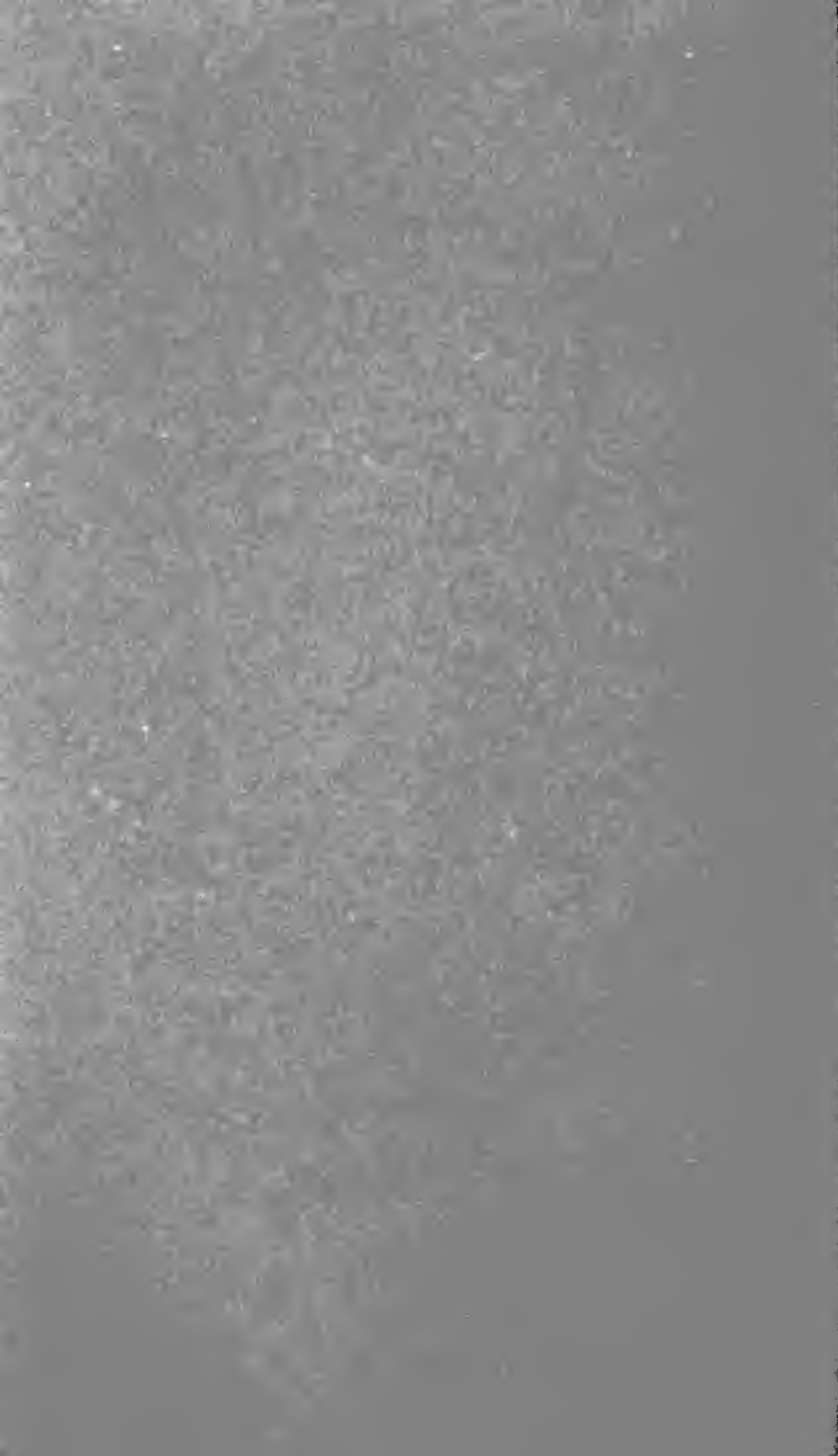
Deputy City Attorney,

Attorneys for City of Los Angeles, Appellee.

TRIPPET, YOAKUM, STEARNS & BALLANTYNE,

By F. B. YOAKUM, JR.,

Of Counsel for Appellee.



APPENDIX "A."

Authorities Relative to Interpretation of Findings.

Rule 52(a), F. R. C. P., provides:

"* * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. * * *"

Randall Foundation v. Riddell, 244 F. 2d 803, 805 (9th):

"Furthermore, the appellate court would assume thereby the power of making findings of fact, which passed out of the federal system with the abolition of trials de novo. The appellate courts of the federal system have such power neither inherently nor by grant, express or implied. The Rules say that the findings of fact of the trial judge shall not be set aside unless clearly erroneous and no exception is made as to facts found based upon writings."

Glens Falls Indemnity Co. v. United States, 229 F. 2d 370, 373 (9th):

"An appellant's mere challenge of a finding does not cast the onus of justifying it on this court. The party seeking to overthrow findings has the burden of pointing out specifically wherein the findings are clearly erroneous. Appellant has not carried the burden as to any particular challenged findings sufficiently to require or justify a detailed analysis of the evidence, particularly in view of the exhaustive study and discussion of the facts contained in the trial court's written memorandum."

Carr v. Yokohama Specie Bank, 200 F. 2d 251, 255 (9th):

“Where there is, as here, a conflict in the evidence it becomes the duty of the trial court to appraise all facts adduced in proof and it is not clearly erroneous for that court to choose between two permissible and conflicting views as to the weight of the evidence. * * * We may not disturb such a choice by the trier of the facts. On the record made in this case we must and do conclude that the findings of fact are not clearly erroneous.”

Faivret v. First National Bank, 160 F. 2d 827, 829 (9th):

“From an examination of the record, it is clear that the trial court based its conclusion largely upon an evaluation of the testimony given, much of it being conflicting. * * *

“This Court has repeatedly held that, under such circumstances, it would not be inclined to disturb the findings of the lower court.”

Tonkoff v. Barr, 245 F. 2d 742, 750 (9th):

“* * * a trial court might have reached a conclusion different from that reached by the trial court below, but we are not left with the definite and firm conviction that a mistake has been committed. * * *

“The foregoing references to the testimony make it apparent that there was substantial evidence upon which the trial court properly could make the findings he did. His short but revealing memorandum decision indicates that the trial judge considered the

motives and other indicia of credibility as applied to the various witnesses and was impressed with that evidence which sustained appellees' position. Under such circumstances it is not our function to substitute our judgment for that of the trial court."

Wilson v. New York Life Insurance Co., 250 F. 2d 649, 651 (8th):

"The findings of the court are presumptively correct and will not be set aside unless clearly erroneous. * * * The defendants were the prevailing parties and, hence, we must take that view of the evidence most favorable to them. They are entitled to the benefit of all favorable inferences which may reasonably be drawn from the facts proven and if, when so viewed, there was substantial evidence to sustain the findings then the judgments may not be reversed by this court unless against the clear weight of the evidence, or unless influenced by an erroneous view of the law."

Maryland Cas. Co. v. Independent Metal Products Co., 203 F. 2d 838, 841, 842 (8th):

"* * * This finding [of absence of negligence] of the court is presumptively correct and will not be disturbed unless clearly erroneous and it is not the function of this court to retry and redetermine the facts involved. * * *

"In considering the efficiency of the evidence to sustain the court's findings we must view the evidence in a light most favorable to defendant. * * *
"* * * Ordinarily the question of negligence is one of fact to be determined by a jury where the case

is tried to a jury, or by the court where the case is tried to the court without a jury. The burden of proof on this issue was on appellant and the finding of the court should not be set aside unless clearly erroneous."

Gibbins v. Utah Home Fire Ins. Co., 202 F. 2d 469, 473 (10th):

"Defendant contends that the evidence is insufficient to sustain the finding that the defendant negligently and carelessly used and operated the rig. * * *. We think it sufficient to say, without further review, that the evidence is sufficient to sustain the finding. * * * It is not our function to determine what the facts are or to determine the conflicts in evidence. We must accept the findings unless clearly erroneous."

United States v. Hill Lines, Inc., 175 F. 2d 770, 771 (5th):

"* * * It is sufficient for us to say of it that the record fully supports appellees' claim that the question of contributory negligence vel non was a question of fact and not one of law, and that it cannot be said as matter of law that the evidence demanded a finding of contributory negligence.

"It is a settled rule of law in Texas and elsewhere that the question of contributory negligence is usually a question of fact to be determined by the triers of the fact. It is rare that a finding on the issue is demanded as matter of law, and this case is no exception."

Herrin Motor Lines v. Jarvis, 156 F. 2d 276, 277 (5th):

“Whether or not the plaintiff’s negligence was the sole proximate cause of the injury in this case is a question of fact which was resolved by the trial Judge against appellant with substantial evidence to support his conclusion. Our judgement should not be substituted for his.”

Ohlinger v. United States, 219 F. 2d 310, 311 (9th):

“* * * Under the circumstances referred to in the rule, it is not necessary to file formal findings of fact and conclusions of law, but when the trial court *does make formal findings*, they alone serve as the court’s findings of fact. In the words of the Supreme Court: ‘We are not at liberty to refer to the opinion for the purpose of eking out, controlling, or modifying the scope of the findings.’”



APPENDIX "B."

Excerpts From Los Angeles City Charter.

Sec. 51 (6). The powers and duties of the City Administrative Officer and the provisions of this section shall not extend or apply to the Departments of Water and Power, Harbor or Airports."

"Sec. 70. The following departments of the city government are hereby created:

* * *

Fire,

Harbor,

* * *

Water and Power."

"Sec. 71. Said above named departments shall each be under the control and management of a board of five commissioners. * * *"

"Sec. 78. The board of each department shall have power (subject to the provisions of this charter and to such ordinances of the city as are not in conflict with the grants of power made to each such department of the city government elsewhere in this charter), to supervise, control, regulate and manage the department * * *."

"Sec. 138. Subject to the provisions of this charter, the Board of Harbor Commissioners shall have the management, supervision and control:

(1) Of all navigable waters and all tidelands and submerged lands * * * at Los Angeles Harbor and within the limits of the City of Los Angeles; * * *"

“Sec. 139. The Board of Harbor Commissioners shall have power and it shall be its duty:

(g) To acquire, provide for, erect, maintain, and operate all such improvements * * * facilities and services as it may deem necessary or convenient for the promotion or accommodation of commerce * * *.”

“Sec. 141 (a). The general manager of the Harbor Department * * * shall have power, and it shall be his duty:

* * *

(2) To supervise and manage all construction and maintenance work authorized or ordered by the board * * *.”

“Sec. 220. The Department of Water and Power shall have the power and duty:

(1) To construct, operate, maintain, extend, manage and control works and property for the purpose of supplying the city and its inhabitants with water and electric energy * * *.”

“Sec. 345. * * * Such budget [the general city budget] shall not cover the operations either as to receipts or expenditures of the departments of the city government given control of their own special funds, as elsewhere in this charter provided: namely, the Harbor, * * * and Water and Power Departments * * *.”

APPENDIX "C."

Authorities From Other Jurisdictions Holding That Failure to Dig Up and Inspect a Buried Cast Iron Pipe Is Not Negligence.

Brown v. Grand Rapids, 251 N. W. 561, 562-3 (Mich.)—Pipe buried four feet underground and burst after it had been installed for 33 years. Held:

"The water was shut off almost immediately after the break was discovered. Shortly thereafter, when repairs were made, the lateral was found to be in good condition and, with the exception of a short piece removed in order to make a new connection at the point of breaking, the entire section remained in use for four years, after which time new developments made its replacement advisable. * * *

* * *

"Plaintiff falls back upon the contention that there were no proper tests or inspections conducted by the city, but suggests no reasonable tests or methods of inspection. The testimony reveals with certainty that there were no similar breaks in the near vicinity. If it was incumbent upon the city to make such tests and inspections as are demanded by plaintiff, at places where there had been no previous trouble, it would mean that the city would constantly be obliged to dig up its streets and inspect its water mains. The further question arises as to how frequently, in that eventuality, such inspection should be made. If the city should apply the knife test to all its mains after they were exposed by excavations, and a leak should occur shortly thereafter as a result of electrolysis, would the city be responsible for improper inspec-

tion? The expense of maintaining a system under those circumstances would be such as to make the cost of supplying water almost prohibitive.”

Philadelphia Ritz Carlton v. Philadelphia, 127 Atl. 843, 844-845, (Pa.)—Break in pipe occurred because of a latent defect or flaw after the pipe had been installed 22 years. There had been some leakage in the area prior thereto which was repaired in the usual manner by attaching cast iron sleeve and caulking. Held:

“* * * Here, the defect was latent, and a reasonable examination, such as was given, did not disclose it. * * * There is nothing in this case to show a failure to adopt reasonable precautions to prevent breaks in the pipe, or, when repairs were made, that other than approved means were adopted to secure renewed safety. * * * Because the accident might have been prevented by adopting some special method or device, when such is not commonly done by reasonably prudent persons under similar circumstances, does not prove negligence.”

Republic Light etc. Co. v. Cincinnati, 127 N. E. 2d 767, 772-773, (Ohio)—Cast iron water main broke after it had been in use for 55 years. The break was due to an erosion caused either by a “scouring” process or electrolysis caused by transient currents of electricity. Held:

“There was evidence that breaks in the various mains in the city occurred to the extent of 250 to 300 a year. The evidence fails to show (even if controlling) that such breaks were in mains similar to the one here involved, under similar pressure, of the same life, or in other ways identical in char-

acter with the main in question. It is questionable whether such evidence was even competent.

“It is the claim of the plaintiff that there was substantial evidence indicating that inspection could have been made which would have prevented the loss for which plaintiff seeks recovery. * * * It is sufficient to say that after examining all the evidence submitted, no substantial evidence appears justifying the conclusion that any feasible or reasonable method of inspection would have disclosed the imminence of a failure in the particular section of the main here involved.

“In addition, there was a complete failure in the attempt to show a standard of care employed by those situated similarly to the defendant. Proof of such standard of care is required. * * *

* * * * *

“No evidence was submitted from which it could be concluded that the city should have been put on notice of the prospect of possible failure of the water main here involved. * * *

“The burden rests upon the plaintiff to show that its damage was the proximate result of the city’s failure to inspect this particular main. It is not clear that had this main been exposed for inspection 10 days before the break that unless a most careful examination had been made of the exact spot where the leak occurred, the leak would have been prevented. Can it be that periodically (how often) the city is required to expose the miles of pipe employed and scrape or otherwise test each inch of each section of pipe, or not doing so, be compelled to respond in damages for the result of a leak, the imminence

of which it had not the slightest notice? Our answer is, that it is not so required.

“There is no evidence that any number of cities, similar to the city of Cincinnati, employ any methods of inspection which would have disclosed the imminence of a break such as occurred in the water main in question.”

Taphorn v. Cincinnati, 122 N. E. 2d 307, 308 (Ohio)
—Break in the city’s water main which was installed in 1911; there had been no inspection since installation.
Held:

“The burden of proof rests upon plaintiffs.

“The bursted section of main was not in evidence and there is no proof in the record as to its actual condition. The record does show that approximately five and one-half feet of the particular 12-foot length was removed and replaced by joining new main to the remainder of the original 12-foot length installation. There is no technical or expert testimony in the record as to the life of a cast iron water main, such as was installed here. Counsel argue a duty to inspect, but no standard or method in modern use by the ordinarily prudent city in the operation of a waterworks system is in evidence to guide the court or jury.”

City of Richmond v. Hood Rubber Co., 190 S. E. 95, 98, 100 (Va.)—A city water meter installed in a box 18 inches under ground gave way after in use 12 years.
Held:

“* * * The sole charge was the maintenance of a defective meter. There is no evidence which shows that the meter was improperly installed. It was placed

18 inches under the sidewalk, in the ground and in a regular meter box. There is no evidence which tells us that this was improper installation. * * *

“The meter was installed in 1922 and had been in continuous use. * * * It complied with the specifications of the American Water Works and the New England Water Works Associations. Approximately two million of them were in use at the time of the injury here. There being no wear upon that part of the meter where the leak occurred, its life is indefinite.

“There was an entire absence of any evidence which would show or even tend to show that the common usage or good practice of other municipalities or water companies engaged in a similar business, supplying a similar service under substantially similar conditions, required an inspection of a water meter after installation.

“Likewise, there was an entire absence of any evidence which tended to show the existence of a single circumstance or condition, which if followed would have disclosed the defect. *It would not be reasonable to hold the city liable for a failure to inspect its meters when it has not been shown either that good practice required an inspection or what would be a fair standard of inspection.* * * *

“The court below * * * charged the city with knowledge of the defect if it had existed for such length of time that the city through its officers should have acquired notice. We think the court was in error in so amending the instruction. A defect may have existed for a great length of time and could not have been detected by any kind of in-

spection. The instruction would charge the city with notice of latent and hidden defects in its water system. The test is not the length of time the defect may exist. It is, to use the language of the attorney for the city, 'the susceptibility to discovery' and the length of time the defect may exist that would be sufficient to charge the city with notice."

Midwest Oil Co. v. Aberdeen, 10 N. W. 2d 701, 704 (S. D.)—Gasoline station damaged by a break in the city's 10-inch water main. Held:

"We are of the opinion, further that any inference of negligence occurring following the installation of the main is rebutted by facts of record showing that the main was not subjected to any abnormal pressure and was of a type that should last for years in excess of the time this main was in the ground. There was no occasion for the city either to replace or inspect the pipe following its installation."

Da Prato v. Boston, 134 N. E. 2d 438, 439 (Mass.)—The cast iron water pipe was laid in 1892 and burst in 1948. Held:

"There was no evidence here that the pipe in question was not properly laid or that it was of a kind which after the length of time it had been in the street could not safely be used. It may be considered settled that reasonable care on the part of the city did not require the periodical digging up of the street for purposes of inspection."

Stein v. City of Newark, 52 Atl. 2d 66, 69 (N. J.)—
Water leakage in the city's system. Held:

“Now, another case I would like to call attention to is in Massachusetts, the case of *Gerard v. City of Boston*, 13 N. E. 2d 415, where the Supreme Judicial Court of Massachusetts said, ‘We think that there was no evidence of negligence. The cause of the break is unknown.’ There is no evidence in this case to indicate what caused this break. ‘No negligence in laying the pipe or in maintaining it appears. There is no evidence that a pipe as old as this one (37 years) may not safely be used. The slight seepage which was noticed in the basement might have come from a variety of sources, some of which might not have been in the control of the defendant, and did not indicate a defect in the main. We think that due care did not require the defendant to expose and examine all the pipes at the intersection of the streets named.’ ”

No. 16388

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GRACE & Co. (Pacific Coast), a corporation,

Appellant,

vs.

THE CITY OF LOS ANGELES, a municipal corporation,

Appellee.

APPELLANT'S REPLY BRIEF.

PHILLIP K. VERLEGER,

JACK T. SWAFFORD,

HOWARD J. PRIVETT,

MCCUTCHEN, BLACK, HARNAGEL & SHEA,

727 West Seventh Street,

Los Angeles 17, California,

Attorneys for Appellant.

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PAUL P. O'DRIEN, CLERK



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No. 16388

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GRACE & Co. (Pacific Coast), a corporation,

Appellant,

vs.

THE CITY OF LOS ANGELES, a municipal corporation,

Appellee.

APPELLANT'S REPLY BRIEF.

I.

Brief Recapitulation of Appellant's Contentions.

Appellee (sometimes referred to herein as the City) in its answering brief, hotly disputes a few of the propositions advanced by Appellant, but it either passes in silence with apparent acquiescence or says very little about a considerable number of others. To a degree, even the arguments which Appellee purports to answer are arguments other than those made by Appellant. This misdirection of energies by an appellee is common enough, for it is seldom that the appellant and the appellee see the issues in a lawsuit in exactly the same light. Therefore, in order to bring the actual conflict of views into as sharp focus as it can, Appellant should like at this point briefly to recapitulate its arguments.

Appellant made the following points in its opening brief:

First: In the activity here involved the City was a marine terminal operator, essentially a warehouseman. It offered its premises for use by the general public for a price. It was, therefore, under a plain duty to maintain its premises in a safe condition for the protection of the goods stored in response to such an offer. Accordingly, Appellant maintains that the trial court's findings that the City was under no such duty are clearly erroneous. (See Sec. I of App. Op. Br. pp. 28-36.)

Second: The City, in carrying on its terminal business as a warehouseman, acted in a proprietary, not a governmental, capacity. As such, it was subject to the same liability and the same duties as a private individual insofar as concerns all activities connected with the operation of that business, including the maintenance of the warehouse sprinkler system and the water pipelines leading thereto which were located on property under the jurisdiction of and maintained by the City in its capacity as a warehouseman. Plainly, therefore, the trial court committed clear error in finding that the City's liability was to be determined by the more limited and less demanding standard of conduct applicable to a city when discharging a *governmental* function. (See Sec. II of App. Op. Br. pp. 36-41.)

Third: The City clearly breached its duty to maintain its premises in a safe condition by reason of the following circumstances and conditions, each of which compels the conclusion that the trial court committed clear error in not finding that the City failed to exercise reasonable care in the discharge of its duties for the care and protection of Appellant's goods: (1) the City introduced no evidence that the casualty occurred despite the exercise of due care (see Sec. III(j) of App. Op. Br. p.

56); (b) the doctrine of *res ipsa loquitur* is applicable, and the trial court's finding of no negligence is clear error because the City submitted no evidence that the casualty occurred in spite of the exercise of due care to prevent it (see Sec. III(k) of App. Op. Br. pp. 56-58); (c) the City, as the owner in possession of the area of Berth 59, is in this negligence action held to have known what it should have known, and it is plain that the City, by and through its Harbor Department, failed utterly to keep abreast of pertinent matters which affected its operation of Berth 59 as a warehouseman, and, in particular, the City was clearly negligent by reason of its claimed voluntary ignorance of the corrosivity of the soil in the area of Berth 59, and the weakness and probable shorter life of unprotected cast iron pipe in such soil (see Sec. III(1) of App. Op. Br. pp. 58-62); (d) the City by and through its Water Department acted negligently because the Water Department had complete knowledge of all relevant circumstances, and in the circumstances was under a plain duty to communicate its fund of knowledge to the Harbor Department, which it did not do (see Section III(m) of App. Op. Br. pp. 62-64); and (e) the City's admitted policy of "maintenance," based solely on economic considerations, was to do nothing about either inspecting or replacing superannuated pipe until after water appeared on the surface, which policy of expedience was adhered to in this instance even though the pipe in question had apparently leaked water for some time prior to its ultimate destructive failure, and although the reasonable life of the pipe had expired some fifteen to twenty years prior thereto. (See generally, Secs. III and IV of App. Op. Br. pp. 41-72.)

Fourth: Even if it be assumed, *arguendo*, that the governmental standard of care was the applicable standard,

the trial court clearly should have found that the City acted negligently in discharging that duty of care in respect of Appellant's goods (See App. Op. Br. pp. 73-76).

Fifth: It was patent and reversible error for the Court to admit in evidence the so-called "additional" answer given by the City to an interrogatory propounded to the City by Appellant pursuant to Rule 33 of the Rules of Civil Procedure. The admission of that hearsay evidence over plaintiff's objection constituted prejudicial error because it was the only "evidence" which will sustain the trial court's findings that the City's Harbor Department did not have actual notice or knowledge that graphitic corrosion was occurring in the pipelines in the area of Berth 59 (See App. Op. Br. pp. 76-80).

II.

The Findings of Fact Concerning Which Appellant Complains Are "Clearly Erroneous" Within the Meaning of That Term as Used in Rule 52(a) of the Rules of Civil Procedure.

Appellant agrees with the City that Rule 52(a) of the Rules of Civil Procedure states the controlling test for the consideration of certain of the specifications of error made on this appeal. Appellant, however, feels that the extracts from cases set forth by the City in its Appendix "A" do not completely state the principles applicable to a review of the evidence in this case.

The basic test is set forth clearly and succinctly in *United States v. United States Gypsum Co.*, 333 U. S. 364, 68 S. Ct. 525 (1948):

"A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (333 U. S. at 395, 68 S. Ct. at 542.)

Moreover, generally speaking, where much of the evidence on a subject is of a documentary nature *or* rests on circumstances concerning which there is no dispute, a finding of fact does not command the strong presumption of verity which usually attends a finding.

General Casualty Co. v. School District No. 5, 233 F. 2d 526, 528 (C. A. 9th 1956);

Smith v. Royal Ins. Co., 125 F. 2d 222, 224 (C. C. A. 9th 1942); and

Kuhn v. Princess Lida of Thurn & Taxis, 119 F. 2d 704, 705-706 (C. C. A. 3d 1941).

It is Appellant's position that this is a case where the evidence is not to any crucial extent conflicting; that there is no issue as to the candor and credibility of any of the witnesses; and that those factors, therefore, were of no importance or significance in resolving the issues presented to the trial court. Moreover, the Supreme Court, referring to Rule 52(a), observed in the *United States Gypsum Co.* case that even in cases where candor and credibility of witnesses are important, an appellate court is not precluded from reviewing the matter, stating:

"It was intended, in all actions tried upon the facts without a jury, to make applicable the then prevailing equity practice. . . . The practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court. The findings were never conclusive, however." (333 U. S. at 394-395, 68 S. Ct. at 541-542.)

Appellant submits that in this case the findings of the trial court are not in any sense “dependent” upon testimony involving a judging of the candor and credibility of the witnesses by the trial court in its observation of the witnesses.

It should be noted further that Appellant is not asking, as the City would seem to imply by its quotation from

Randall Foundation v. Riddell, 244 F. 2d 803, 805
(C. A. 9th 1957),

that this Court utterly disregard the findings of the trial court and make its own findings of fact. The City neglected to note the contention upon which this Court was passing in making the ruling quoted by the City. The narrow question which this Court was there considering was phrased as follows:

“Appellant urges that, since there is a written stipulation as to certain facts, this Court must disregard the findings of the trial court and decide the case on our interpretation of the documents.”
(244 F. 2d at 805.)

Appellant here makes no such contention. It maintains only that the findings of fact referred to in its Specifications of Error in its opening brief are “clearly erroneous” within the meaning of that term as used in Rule 52(a) of the Rules of Civil Procedure, and that this Court should upon reviewing the entire evidence be left “with the definite and firm conviction that a mistake has been committed.”

III.

The City May Not Successfully Claim That It Did Not Owe a Warehouseman's Duty Towards Appellant's Goods.

Section I of Appellant's Opening Brief (pp. 28-36) was directed at the establishment of the relation between the City and Appellant and the nature of the duty created thereby. The trial court found (and there can be no dispute as to this): (1) that it was not true that the City was under any duty to provide a safe place for the storage of Appellant's goods (Find. of Fact No. 8 [R. 102, and See App. Op. Br. p. 7]) and (2) that the City was not a marine terminal operator (Find. of Fact Nos. 3 and 7 [R. 100, 101, and see App. Op. Br. pp. 6, 7]).

Concerning these contentions, the City merely observes without discussion or citation of authority:

“There is no evidence that the City was a warehouseman; nor is there evidence of any contractual relation between the City and Grace [Appellant]; . . .” (Appellee's Br. p. 20.)

Obviously such *ipse dixit* type comments beg the question. A warehouseman is a commercial bailee. In the definitions section of the California Warehouse Receipts Act, found in Section 1858.04 of the California Civil Code, it is said:

“‘Warehouseman’ means a person lawfully engaged in the business of storing goods for profit.”

It is obvious that goods may be placed in a warehouse by the owner, by a common carrier or by someone else. The facilities at Berth 59 were (as appears without dispute from the regulations on tariff) used for the receipt of merchandise discharged from steamships coming into

Los Angeles Harbor, or which was about to be loaded in such vessels. As a matter of fact, it is common knowledge that such uses are precisely what a pierside shed is used for. In this context, therefore, the owner of the merchandise so stored normally is the holder of a steamship bill of lading who has contracted with the carrier who placed the merchandise in the warehouse. This chain of events does not make the City any less a warehouseman, nor does it lessen its responsibility concerning the goods entrusted to it.

A warehouseman who holds his premises out for hire to the public is responsible for their safety, and the finding of fact that there was no duty on the part of the City to provide a safe place for the storage of Appellant's goods, is "clearly erroneous" by any test.

See cases cited in Appellant's Opening Brief, Sec. I(c), pp. 32-36.

IV.

The Trial Court Committed Clear Error in Finding That the City Acted in a Governmental Rather Than a Proprietary Capacity Insofar as Concerns the Activity Here Involved.

The vulnerable jugular vein of the trial court's findings is its finding that the City operated and maintained the eight-inch water line system in the area of Berth 59 as a governmental activity (Find. Nos. 16 and 20 [R. 104, and see App. Op. Br. pp. 10, 11]). Appellant maintains that the operation and maintenance of that water line system was part and parcel of its operation of the warehouse facilities and as such was not severable therefrom; the finding to the contrary involves an error so basic that it necessarily produced an incorrect result in this case.

The City argues strenuously that because the water line system was used solely for fire fighting purposes, all aspects of the operation and maintenance of the water line are thereby clothed in the protective mantle of governmental immunity. The City's position is clearly and demonstrably erroneous, and its authorities cited in support thereof are wholly inapplicable to this case.

The City's attempts to isolate the operation and maintenance of the eight-inch water line system from the operation and maintenance of the warehouse and other facilities in connection therewith, must fail for the water line system is a necessary part thereof and adjunct thereto. It is no more severable from the activity of operating the warehouse than is the maintenance of the warehouse roof. Clearly, the City by and through its Harbor Department acted in a proprietary capacity in connection with the operation of the warehouse, including the operation and maintenance of the eight-inch water line system, a component part thereof.

Before discussing some of the City's authorities, however, it is instructive first to advert to the common sense considerations of this situation. The City was operating for hire a transit shed for the receipt and storage of the merchandise of the public. That, of course, is a function carried on by private individuals as well as by some governmental agencies. Private warehouses commonly have automatic sprinkler systems and just as commonly they have pipelines that are intended to provide water to such systems. Those are matters of common knowledge.

Such systems are an essential part of an effective, safe operation of a warehouse, and frequently, as in this case, a municipality requires in certain cases the installation of an automatic sprinkler system. In operating a warehouse

having in excess of 12,000 square feet the City by and through its Harbor Department was subject to the same requirements as are imposed upon all persons engaging in proprietary activities utilizing structures of that size in Los Angeles. Appellant submits that the City may not engage for profit in this general proprietary activity, and then when something goes amiss seek refuge in the immunity provided for the conduct of governmental activities on the ground that this segment of its operation of the warehouse may be spun off for purposes of determining liability for negligence. The City here is attempting to make unwarranted use of the wholly irrelevant fact that it is a municipality and as such engages in governmental as well as proprietary activities.

It is true enough that a system such as this is a means for fighting a fire. But in the same sense it is equally true that fire doors, concrete walls, special electrical wiring, and all other precautions commonly required by modern building codes are intended to fight fires and to prevent them from spreading.

The automatic sprinkler system (including water lines thereto located on the owner's property) and the fire doors of a warehouse operated by a private individual are not endowed or blessed with any special immunity, governmental or otherwise. It is submitted, therefore, that lacking an authoritative holding to the contrary (and the City has cited none), it is fallacious and clearly erroneous to conclude that an identical facility (together with all of its parts) operated and maintained by the City, is not operated *in toto* in a proprietary capacity, and that merely because the water line system and the automatic sprinkler system are used only for fire purposes it thereby becomes a part of the ordinary fire system such as is maintained

by a municipality in a public street, and as such is effectively sealed off from the imposition of the proprietary standard of care.

There is an obvious and sound distinction between fire fighting facilities which the City provides and maintains as part of its duty to the public in general, *i.e.*, its fire engines and fire hydrants, vis-a-vis the automatic sprinkler system which it installs and maintains for precisely the same reasons and in precisely the same way as any private warehouseman. There is no sound reason in law or in logic for imposing a different and lesser standard of care in the latter instance. Appellant submits that when a city engages in a commercial business, the things it does in the course of that business which are commonly done by private individuals engaging in such a business acquire no sovereign immunity, but must be scrutinized by the ordinary tests applicable to any other person engaging in such a proprietary activity.

It is appropriate at this point to consider the misplaced nature of the City's reliance upon certain language quoted by it (Appellee's Br. p. 32) from

City of Richmond v. Virginia Bonded Warehouse Corp., 138 S. E. 503, 507 (Va. 1927).

The City here argues that under the rule which it would extract from that case the maintenance of the water mains here involved is an activity which is clothed with governmental immunity by reason of the fact that the water mains were installed in compliance with Section 91.0506 of the Los Angeles Municipal Code [Ex. R], and by reason of the further claimed fact that the water mains were "subject to the superior authority of the Fire Department." (Appellee's Br. pp. 32-33.)

In the *City of Richmond* case (decided 32 years ago) the court was dealing with the following assignment of error by the defendant municipality:

“The evidence clearly shows that, in offering to the plaintiff free of charge the facilities for preventing the inception and spread of fire, petitioner was exercising a governmental function, for the improper exercise of which petitioner cannot be held liable in damages.” (138 S. E. at 506.)¹

The court there rephrased the city’s contention as follows:

“The suggestion is also made that the object of the sprinkler was to prevent fires, and that the public was interested as well in preventing fires as in extinguishing them after they have started; that no charge was made for the water used by the sprinkler in extinguishing fires, and hence the act of the city in furnishing water to the sprinkler should be classed as a governmental act in like manner as the acts of the fire department.” (138 S. E. at 507.)

The Court rejected that contention, stating:

“The city had a right to charge for the water used by the sprinkler, and the fact that it did not is no answer to the charge of negligence of the city resulting in the damage of the plaintiff. Even a volunteer or a stranger is liable for an injury negligently inflicted on the person or property of another.” (138 S. E. at 507.)

¹The City incorrectly states that in that case “the warehouse company *bought* the water from the City.” (Appellee’s Br. p. 31; emphasis added.)

It is obvious that the thrust of the argument which the Court dealt with in that case was the contention concerning the effect of furnishing water without charge. The Court merely rejected any such arbitrary distinction. Moreover, the implication in the opinion to the possible effect that if police regulations require the installation of a sprinkler system governmental immunity might attach, is most ambiguous. That language, relied upon by the City in this case, is as follows:

“Such installations, when not required under police regulations, are made by municipalities in their private or proprietary capacity.” (138 S. E. at 507.)

Initially, it is difficult to understand why the Court referred to installations made by “municipalities” rather than by private individuals. It was the private individual, not the city, which had made the installations which were involved in that case.

Further, it is clear from the authorities cited by the court in the *City of Richmond* case,

Keystone Investment Co. v. Metropolitan Utilities Dist., 202 N. W. 416 (Neb. 1925);

Gordon & Ferguson v. Doran, 111 N. W. 272 (Minn. 1907); and

J. W. Edgerly & Co. v. City of Ottumwa, 156 N. W. 388 (Iowa 1916),

that the court's references there to installations being required by police regulations and to “compulsion” by the city, were derived originally from consideration of arguments advanced in the cited cases by a private individual that a utility's rates for water supplies to a sprinkler system installed on the individual's premises were unreasonable and discriminatory. The utility invariably countered with claims that such installations were put in by

the individual voluntarily for his own private benefit, and that the utility had to maintain larger mains, larger pumping capacities and incur other burdens in maintaining their water systems because of such installations by private individuals, and that such burdens justified the increased charges for water to such persons. Accordingly, the language upon which the City pins its hopes has no real applicability to the question presented here, *i.e.*, that of determining whether one aspect of the operation of the business of a warehouseman involves a proprietary or a governmental function.

In any event, if the argument of the City predicated upon the language it quotes from the *City of Richmond* case is carried to its "logical" conclusion, it becomes illogical in the extreme. It would mean that where a police regulation requires the installation of an automatic sprinkler system, all warehousemen (and any other person coming within the scope of the regulation) installing such a system would enjoy governmental immunity with respect to its operation and maintenance. It would mean that every such warehouseman (or other person) would to a slight degree act in a governmental capacity in one facet of his operations. Such a result is palpably ridiculous.

Appellant knows of no case which applied such a novel theory.

In

Schell v. Miller North Broad Storage Co., 45 A.
2d 53 (Pa. 1946),

the Supreme Court of Pennsylvania was confronted with a case involving a claim of negligence arising out of the failure of fire doors to operate correctly during a fire which destroyed the plaintiff's goods. The case was tailor-

made for the application of the approach suggested by the City here. The court there, however, pointed out the absurdity of a contention grounded in the assumption that the duty of the operator of a warehouse ended with compliance with applicable statutes and ordinances, stating:

“This brings us to the principles of law which govern this phase of the case. Appellee contends that it installed the doors because it was required to do so by applicable statutes and ordinances, that they conformed to the requirements of the law, and that therefore it performed its full duty. This cannot be approved as a correct statement of the law. Everyone knows that even automatic devices do not continue to operate indefinitely without human attention. A prudent householder has his thermostat and the connected apparatus inspected periodically, perhaps, annually, and repaired if necessary. Installing the fire doors according to a statute or an ordinance was not the full measure of appellee’s duty. It was obliged to maintain them in such condition that they would perform the function for which they were installed.” (45 A. 2d at 56.)

Turning to the next facet of the position espoused by the City, it is clear that the pipelines here involved were maintained by the Harbor Department, not by the Fire Department, of the City of Los Angeles. The City does not even use the term “operate” or “maintain” in connection with these pipe lines; it makes only the equivocal statement that they were “subject to the superior authority of the Fire Department.” (Appellee’s Br. p. 33.) What the City leaves entirely unstated is the fact that the so-called “superior authority” becomes operative only in the event of a fire. Here, of course, there was no fire. The damage did not occur as a result of anything done or

not done by the Fire Department or by any other department during a fire. The City does not claim that the Fire Department had control over the installation or maintenance, including inspection and replacement, of the water lines. Obviously only the Harbor Department had such control. Language from the *City of Richmond* case is most apt to this contention:

“The work to be done in the instant case appertained to the city water department, and the negligence proved was that of an employee of that department. The city, therefore, cannot defend on the ground that the negligence occurred in the exercise of a governmental power.” (138 S. E. at 507.)

Here the work to be done was the proper maintenance of the eight-inch water line system, and that work was the work of the Harbor Department. The negligence proved was that of the employees of that department. The City, therefore, cannot defend on the ground that the negligence occurred in the exercise of a governmental power.

The City also appears to argue that where there is a separate water system maintained by a municipality for its fire department governmental immunity attaches to such an operation. But even if that were true (and the City has cited no case so holding), manifestly that is not the case here. There is no separate water system maintained by the City throughout its jurisdiction for the use of the Fire Department. The eight-inch water system here was maintained by the City because through its Harbor Department it was engaging in a proprietary activity, and it had to have water supplies for its automatic sprinkler system. There is, of course, no evidence that the City installed such a system for all other operators of warehouses (or other persons required to have such systems) within its jurisdiction.

V.

The Trial Court Committed Clear Error in Not Finding That the City's Conduct Constituted Negligence Under the Proprietary Standard of Care.

(a) Preliminary.

In Section III of Appellant's Opening Brief, Appellant discussed the clear error committed by the trial court in not finding that in the circumstances the City acted negligently in respect of Appellant's goods, and, in particular, that the City's "do nothing" policy concerning inspecting and replacement of its water lines constituted negligent conduct. The City's scattered response to that contention is found in its Section I and in its "Statement of the Case." In essence the City now appears to claim that it was *not* the City's policy to "do nothing," and even if it was, the policy was a reasonable one. These arguments will be taken up in order.

(b) The City's "Do Nothing" Policy.

At page 16 of its brief the City makes the startling statements that it does not agree that the Harbor Department adopted a "do nothing" policy concerning inspection and replacement of its water lines; that the trial court referred to a "do nothing" policy with respect to inspection "but not as to 'replacement' "²; and that "this [*i.e.*, the policy to 'do nothing'] was not in the Findings."

²The City's precise statement on this point is:

"It is true that the trial court's opinion, removed from its context, uses the phrase 'do nothing' with respect to inspection—but not as to 'replacement'" (Appellee's Br. p. 16.)

This statement engenders some doubt in Appellant as to what is meant by removing the trial court's opinion "from its context," but apparently the City's attack is two-pronged: (1) there was not a "do nothing" policy as to either inspection or replacement, and (2) in any event there was not a "do nothing" policy with respect to replacement.

This contention is entirely devoid of merit. The trial court upon the basis of uncontradicted evidence³ found in Finding No. 11 [R. 102-103]:

“ . . . it is true that the City adopted a policy of not maintaining, repairing or replacing its buried water pipe lines until some trouble was reported or some evidence of leakage developed.”

Moreover, the only witness who testified directly on the subject stated that the Harbor Department had a policy of not reading the detecto meters which were installed on the laterals [R. 187] even though it could have done so [R. 278].

The findings, clearly in the disjunctive, may not now be impugned by the City. It is settled, therefore, that for purposes of this appeal the Harbor Department *did nothing until it discovered water on the surface*; that it conducted no periodic inspections; and that it had no program at all for periodic replacement of superannuated pipe, whether it was protected or unprotected cast iron pipe, and whether in “hot” soil or not.

(c) The Contention That the “Do Nothing” Policy Was a Reasonable One.

The City advances a number of reasons why its policy was reasonable and Appellant will deal with each reason separately.

³This evidence includes the City’s own answers to interrogatories. [R. 143-4, 150-1, 152, 157, 159-160.]

(1) THE “NO PRIOR FAILURE” ARGUMENT.

Relying solely on the testimony of Charles V. H. Brashier, the City’s plumber, the City makes these assertions:

“Prior to this break, there had been but one corrosion failure of Harbor Department pipe in the area, which occurred about 1926 [R. 435].” (Appellee’s Br. p. 5.)

“In this 40 year period the only corrosion break in the entire system of more than 10 miles of pipe was the one under Municipal Warehouse No. 1 [R. 436-437].” (Appellee’s Br. p. 5).

Those assertions obviously strike at the heart of Appellant’s Specification of Error No. 9 (App. Op. Br. pp. 21-24, 76-80) dealing with the improper admission of an “additional” answer by the City to an interrogatory propounded under Rule 33 of the Rules of Civil Procedure. That aspect of this matter is also considered in a later portion of this brief directed specifically at the City’s response to Appellant’s contentions concerning that specification of error.

Turning first, however, to Mr. Brashier’s testimony, it is clear that it was merely to the effect that *he did not know* of any breaks other than the one in 1926 [R. 435-436]. The record is barren of proof that he was in a position to know of all failures or the reasons therefor. On the contrary, he conceded he wasn’t present when the two pipes involved in Appellant’s Specification of Error No. 9 were taken out [R. 450-451], and he further testified:

“I have been on vacations and been away and there could be things done, when I was not present when they were done.” [R. 451.]

Moreover, there is a complete absence of proof that Mr. Brashier was qualified to make a diagnosis of graphitic corrosion as the cause of a break. His testimony was that he had seen only two breaks involving corrosion, the pipe involved in this action, and the incident of 1926 [R. 449].

Other evidence bearing upon prior pipe failures known by the Harbor Department to be due to graphitic corrosion is found in the City's original answer to Plaintiff's Interrogatory No. XIV(b) which was put in evidence by Appellant [R. 156-157]. That answer established that the Harbor Department had experienced two prior failures of cast iron water pipe due to corrosion, one in 1954 at Berth 60 and another in 1955 at Berth 59 itself. Over Appellant's objections there was received in evidence a later and "additional" answer to the said interrogatory (voluntarily made and filed without leave of court) which claimed, without stating why, that the original answer was in error and that in fact neither of the breaks was due to corrosion [R. 163-164].

Appellant submits that even if its Specification of Error No. 9 is not sustained in its entirety, the City's "additional," self-serving answer to the interrogatory is insufficient basis for deterring this Court from arriving at a "definite and firm conviction that a mistake has been committed" by the finding that the City did not know or have notice of the defective condition of the pipelines (Find. No. 22 [R. 105, and see App. Op. Br. p. 13]), and by the finding that the City did not know or have notice nor should it have known or had notice that the eight-inch pipeline was subject to deterioration and failure from graphitic corrosion (Find. No. 23 [R. 105, and see App. Op. Br. pp. 13-14])). This is so because the

“additional” answer is nothing more than a naked disclaimer of the truth of the original answer; it contains no explanation of or reason for the claimed “error.” The City, of course, was in possession of all records concerning these two breaks. The City’s employees examined the pipes after each break. The records pertaining to the breaks were not produced by the City. The persons who examined the pipes were not called to testify by the City. Applicable, therefore, was the familiar rule that when there is material testimony which would establish a fact in issue and which is in the present ability of the party to present and he fails to do so, and fails to offer a reasonable excuse for such failure, the presumption follows that such testimony, if presented, would be against such party.

Hann v. Venetian Blind Corporation, 111 F. 2d 455, 459 (C. C. A. 9th 1940); and

Perry v. Paladini, Inc., 89 Cal. App. 275, 280-281, 264 Pac. 580 (1928).

It is clear, therefore, that the only “definite and firm conviction” which can come from a review of the evidence in this case is that there was a prior graphitic corrosion break in the same warehouse here involved, and that the Harbor Department had actual knowledge concerning it.

(2) THE CONTENTION THAT THE SOIL IS NOT HIGHLY CORROSIVE.

As is readily apparent from consideration of the evidence specified in Section III(e) of Appellant’s Opening Brief (pp. 46-48) the evidence is without conflict that the soil in the vicinity of the break was highly corrosive. The City, however, apparently recognizing some

what belatedly the crucial nature of this testimony,⁵ now attempts to attack the credibility of the testimony given by Mr. James F. Brennan, an expert witness called by Appellant, by singling out a small part of his testimony.

In its efforts, however, the City distorts the testimony actually given. It reviews the testimony of Mr. Brennan, and in particular relies on the results of what it calls "Brennan's test No. 2," concluding with this misleading bit of argument in its "Statement of the Case":

"It is clear from the foregoing why the trial Court ignored Brennan's testimony concerning his soil tests." (Appellee's Br. p. 11).

Counsel for the City must not have reviewed the record with any thoroughness, for any attempt to connect "Brennan's test No. 2" with any determination made by the trial court concerning his testimony as to soil tests, is a gross misconstruction of the record. With reference to the said test No. 2 Mr. Brennan testified that the sample was no good and couldn't be used [R. 392-393] and that:

"This is completely invalid. There wasn't sufficient quantity for the test, but I ran it anyway." [R. 393.]

When counsel for the City attempted to shake that testimony, the trial court admonished:

"Counsel, you are arguing with the Witness. You are trying to get the witness to say something he hasn't said. He has told you two or three times the sample was so small he couldn't use it." [R. 393.]

⁵This is so because Mr. Ashline, the City's corrosion engineer, and Mr. Brennan, one of Appellant's experts, agreed that in highly corrosive soil, unprotected cast iron pipe such as was installed in this case, has a reasonable life expectancy only of around 20 years, after which it is an extremely poor gamble. [R. 277, 338-9, 341-3.]

Mr. Brennan then testified that because that sample was too small he came to Los Angeles and got samples that were adequate for the purpose of making a Corfield corrosivity test [R. 394].

The suggestion by the City that the trial court did not believe that the soil in question was “highly corrosive” is utterly without foundation. The trial court was firmly of the opinion that the pipe was installed in “highly corrosive soil” [R. 273, 275], and in this connection it observed in its Opinion:

“At the time of installation defendants did not know of the corrosive nature of the soil, but subsequent to the installation the City, or some of its departments, became cognizant that the soil in the harbor area was highly corrosive.” [R. 84.]

The record is replete with testimony concerning the “hot” nature of the soil in the area of Berth 59. The City did not put in any evidence that this was not a “hot” area. As a matter of fact the trial court expressed incredulity that the City would contend the area was not “hot,” saying to counsel for the City:

“Counsel, you are not going to contend this is not hot soil, are you?” [R. 389.]

Counsel for the City evaded that question and in a like manner continued to evade the persistent questions of the trial court:

“Are you going to contend it was not a hot area?” [R. 389.]

“Are you going to have any witnesses who will come in and tell me this is not a hot area?” [R. 390.]

The City produced no such witnesses. All of the experts agreed that the soil was highly corrosive.

The basic question here is whether a warehouseman can without responsibility follow the policy of patching pipe when it breaks because that policy is less expensive than periodic planned replacement, and thereby transfer the risk of damage to its customers. It is productive of nothing but confusion for the City to contend at this late stage that the soil was not corrosive.

(3) THE CUSTOM ARGUMENT ADVANCED BY THE CITY.

Another spurious issue which the City seeks to introduce into the question concerning the custom evidence offered by the City, is that raised by the statement:

“Appellant’s oft-cited statement that the City’s decision not to dig up or inspect buried pipe was based upon ‘economy’ . . . or ‘economic grounds’ . . . is not supported by the record. The policy is stated in Finding 11 [R. 102].” (Appellee’s Br. p. 16.)

Finding No. 11 states in pertinent part:

“. . . it is true that the City adopted a policy of not maintaining, repairing or replacing its buried water pipe lines until some trouble was reported or some evidence of leakage developed.” [R. 102-103.]

If that policy does not rest upon economic considerations, it has no foundation at all. The trial court obviously so believed, and observed in its Opinion:

“Based upon *economic consideration*, defendants established a policy of doing nothing about maintaining, repairing or replacing such water pipe-lines until a leak occurred and water was discovered on the surface of the ground.” [R. 84; emphasis added.]

The City itself states in purported justification of its conduct that the only way one can tell whether a pipe has graphitized is “to completely expose the pipe along its entire surface, and that this was *uneconomical*, unrealistic, unsafe and impractical.” (Appellee’s Br. p. 22; emphasis added.)

Further, in another portion of its brief the City argues that the service laterals could not be “economically” replaced, stating:

“Appellant asserts (App. Op. Br. 54) that short lengths of pipe, such as service laterals, could be economically replaced. The service laterals were estimated by Appellant’s witness, Montgomery, to be a approximately 100 feet in length [R. 322] and he thought there were 3 of them [R. 323]. In fact, there were at least 14 of them [Ex. U] extending in both an easterly and westerly direction from the Water Department’s 10 inch main.” (Appellee’s Br. p. 20).⁶

⁶The City should have read the next paragraph in the record. It discloses that counsel for the City completely cleared up any uncertainty concerning Mr. Montgomery’s opinion, as follows:

“Q. You just assumed that there were two leads into each warehouse. I will get that map and maybe it will be helpful. This map, Mr. Montgomery, has been introduced here in evidence. This is the transit shed at 57, and then I will point to the one at 58. Here is the one at 59 Then there is one at 60. That is to get you oriented. We are looking north up toward the top of this map. Now, then, this map shows that off of the fire main there are two fire service leads going into each of these sheds, so there would be eight of those leads. Do I understand that it would have been your recommendation that all of the leads be removed? A. Yes.” [R. 323.]

The other 6 laterals were on the other side of the street and Mr. Montgomery expressly declined to express an opinion as to their replacement, pointing out that the damage which might be caused by a break on the other side of the street would not be as great as on the side where the transit sheds were located. [R. 323.]

The backbone of the City's justification for its "do nothing" policy lies in the so-called "custom evidence" that for reasons obviously founded solely in economic considerations it is customary for *water companies* to leave water pipes in the ground until the time there have been so many breaks as to compel the conclusion that it will be more costly to continue that policy as to a given line than it would be to replace it entirely [R. 258-260].

Mr. Ashline, the City's corrosion engineer, testified that "ten to perhaps twenty years" is the expected life of poorly protected or unprotected pipe in corrosive soils [R. 277]. Mr. Brennan, one of Appellant's experts, testified that "two-thirds of all failures of cast iron pipe in a corrosive environment such as this would occur between the ages 10 and 35 years with a mean of 25" [R. 341], and that the chances were nine out of ten that such pipe wouldn't last 25 years [R. 342-343].

The testimony by Mr. Ashline is to the further effect that generally the City does not replace pipe until it is obsolete or until it has had "recurring leaks" and the street was to be resurfaced anyway [R. 259-260]. Mr. Ashline and Mr. Brennan each testified to the effect that the "do nothing" custom rests on considerations of economy [R. 258-260, 369].

The precise question presented, therefore, is whether the "do nothing" custom of water companies justifies such nonmaintenance of pipes in soil known to be corrosive and which soil is in the area of a warehouse containing valuable goods. From the authorities cited by Appellant in its opening brief (pp. 64-72) it seems clear that a custom having its roots in economic grounds provides no justification for the deliberate, continued use of a pipeline unsuitable to the situation and where it is known or should

have been known to be dangerous. Accordingly, where a duty of care exists, a custom founded on economic considerations affecting the person under the obligation, rather than upon considerations of due care, is simply no defense.

The City apparently misconceives Appellant's contention concerning the custom evidence. Appellant contends merely that the custom evidence offered by the City has no logical relevance to the standard of care required in the circumstances here, *i.e.*, the operation of a warehouse and the water lines in connection therewith, in an area where the soil is known to be corrosive (or which in the exercise of reasonable care should have been known to be), and where the water lines are so located as to cause substantial damage to valuable goods in the event of a rupture.

On the question of possible damage, the City argues:

“Water pipes, mains, valves and joints frequently leak, but damage is the exception rather than the rule, particularly with respect to pipes buried 9 feet underground.” (Appellee's Br. p. 23.)

But the City does not refer to any evidence in this case which supports that gratuitous assertion. Appellant submits that there is no such evidence, either to that effect or that some unusual set of circumstances caused the damage in this case. The plain, uncontradicted fact is that the City installed this pipe and then ignored it until it broke. Further, the City cites no authorities in support of the novel implication that where damage “is the exception rather than the rule,” there can be no negligence for allowing the damage to occur.

The authorities cited by the City on this question of custom have no application here, and in fact support Appellant's contention. Thus, the quotation from

2 Witkin, Summary of California Law, pp. 1764-1765,

by the City at page 23 of its brief, recognizes that custom is relevant only when it is "the practice of others similarly situated" or the practice of others "performing similar acts under similar conditions." The custom testimony tendered in this case was as to the practice of water companies; it was not the custom of persons operating warehouses containing valuable goods. It was not the custom of "others similarly situated," and there were crucial differences in the "conditions."

The selection of extracts which the City presents (Appellee's Br. p. 23) from

Anderson v. County of Santa Clara, 174 A. C. A. 171, 344 P. 2d 421 (1959),

distorts the holding of the case and is quite misleading. First, the "standard approved practice" consisted of a very careful and cautious approach to burning, including frequent and regular inspections. In addition, a burning permit had been obtained and a nearby forestry station had been notified of the general area in which the burning would be done. Thus, there was not only evidence as to "standard approved practice," but evidence as to the notification of the forestry station, and the careful method of burning which included regular and frequent inspections. It was the total evidence which the court referred to by use of the language "Such evidence," not merely the evidence as to "standard approved practice."

The City's attempt to distinguish

Redfield v. Oakland C. S. Ry. Co., 112 Cal. 220,
224-225, 43 Pac. 117 (1896),

cited by Appellant (App. Op. Br. p. 71) borders on the ridiculous.

The City states:

"In view of the many buried pipe cases available, it would seem that the *Redfield* case has no bearing on this case." (Appellee's Br. p. 26).

The City, however, does not cite a single case (buried pipe case or otherwise) holding that custom based on economy considerations has legal relevance to the establishment of a proper standard of care. Appellant submits that the principle of the *Redfield* case has universal application, and in particular has application to this situation, as it demonstrates that the custom evidence here offered has no legal relevance in that it originated in motives of economy and not from considerations based on the proper discharge of a duty toward others.

As appears from the authorities cited by Appellant (App. Op. Br. pp. 68-72) the very essence of the duty of care imposed by the law of negligence is that it involves the imposition of a standard which is fixed for the protection of persons other than the actor, the defendant. Clearly, therefore, the City here, by accepting as its guiding principle the policy that pipes should be replaced *only* when they become obsolete or break so often that the cost of replacing them is less than the cost of continuing to repair them break by break, has failed to act in a manner reasonably considerate of the safety of Appellant's goods. Such a policy, if allowed to stand as the measure of reasonable and due care, would effectively re-

lieve the City of its duty as a warehouseman simply because its Harbor Department and all water companies have customarily paid no attention to their duty. This sort of bootstrap improvement in a legal position by importing the questionable standards of another and dissimilar business should not prevail.

(4) THE ARGUMENT THAT CAST IRON PIPE
FREQUENTLY LASTS A LONG TIME.

The City is quite enamored of the admitted fact that cast iron pipe in some instances has been used for a long time. In this case the evidence is clear that in *non-corrosive* soils, cast iron pipe may last 150 years. But such evidence is of no assistance in determining the probable life of such pipe in *corrosive soil*. It requires no citation of authority for the proposition that the length of time that non-protected cast iron pipe will last in non-corrosive soil has no relevance to its probable life in corrosive soil.

The City doggedly refers to the fact that the Internal Revenue Service prepared a Bulletin F [Ex. N] showing, for tax purposes, the life of cast iron pipe, and indicating an average life of 75 years for 8 to 10 inch cast iron pipe (Appellee's Br. p. 12). But again, the average life of pipe in all soils (even if known and acted upon) is no proper guide to determining its life in corrosive soil. Here we have positive, uncontradicted evidence concerning the probable ordinary life of cast iron pipe in corrosive soil.

The City also purports to find some comfort in the admitted fact that there is considerable variation in the life of cast iron pipe in corrosive soil. However, since the City's corrosion engineer, Mr. Ashline, and Appellant's

expert, Mr. Brennan, agreed that 20 to 25 years was the average life to be expected in these circumstances [R. 277, 341-343], and no one testified that this pipe reasonably could have been expected to last for 42 years, it is clear that the pipe here involved long prior to 1956 had passed the age when its failure reasonably was to be expected. In fact, in terms of probability, by 1956 its future life hung by a very slender thread of chance.

The irrelevance of the fact that the pipe here lasted 42 years is demonstrated by

Monaghan v. Rolling Mill Co., 81 Cal. 190, 193,
22 Pac. 590 (1889),

where a chain suspended from a hook had fallen upon and injured the plaintiff. In response to the defendant's protestation that the chain had hung suspended there for a number of years without accident, the court said:

" . . . [B]ut that circumstance is only a matter of wonderment, and is an instance of how good luck will sometimes protect carelessness for long periods."
(81 Cal. at 193.)

The only defense tendered by the City in support of this knowing defiance of the law of probabilities is that it is customary among water companies to allow pipe to remain in the ground until it breaks. Again, it is submitted that although that may be prudent practice from a strictly self-serving, economic point of view, it necessarily involves totally ignoring the duty of care owed to the public by a warehouseman who offers his facilities to the public for hire.

(5) THE ARGUMENT THAT THERE WAS NO DUTY TO
DIG THE PIPE UP AND INSPECT IT.

In its Appendix "C" entitled: "Authorities From Other Jurisdictions Holding That Failure to Dig Up and Inspect a Buried Cast Iron Pipe Is Not Negligence," the City cites, briefly discusses and quotes from a number of cases. A reading of these cases demonstrates that in none of them was the corrosive quality of the soil proved, and in none of them was it proved that the pipe was of such an age that it had long since passed the time when a failure should have been expected as a matter of probabilities. It is equally clear that in none of them was the issue the ascertainment of the standard of care owed by a warehouseman with an affirmative duty of care toward goods which it had been hired to store in its facilities.

A closer look at *additional* factors in the cases cited by the City is useful in demonstrating further their complete inapplicability.

In

A. J. Brown & Son v. City of Grand Rapids, 251
N. W. 561 (Mich. 1933),

the pipe which broke was *in a street*. In addition, it will be observed from the quotation set forth by the City (Appendix "C" p. 9) that failure to make tests and inspections was excusable only "where there had been no previous trouble." Here, of course, Appellant contends that the proof is that there had been "previous trouble."

In

Philadelphia Ritz Carlton Co. v. City of Philadelphia, 127 Atl. 843 (Pa. 1925),

contrary to the admitted practice in the instant case, it appears that:

“Regular inspection was had of the entire system, and any observable dangers promptly rectified.” (127 Atl. at 844.)

Further, the cause of the break was due to a flaw in the material which could not have been found by any reasonable test. Here, of course (1) the cause was graphitic corrosion, (2) the corrosive nature of the soil was both known and readily discoverable, and (3) the failure of the pipe within 42 years was readily predictable.

In

Republic Light & Furniture Co. v. City of Cincinnati, 127 N. E. 2d 767 (Ct. of App. Ohio, 1954),

the break occurred in a water main *under a thoroughfare*, and the court expressly stated that the standard by which the defendant's conduct was to be tested was:

“ . . . the care which *reasonably prudent operators of waterworks* are accustomed to use under circumstances similar to those existing in the instant situation” (127 N. E. 2d at 770; emphasis added.)

The court there pointed out that there had been “a complete failure in the attempt to show a standard of care employed by those situated similarly to the defendant.” (127 N. E. 2d at 772). Here, however, the applicable duty was not that of an operator of a waterworks.

Further, the court there stated:

“No evidence was submitted from which it could be concluded that the city should have been put on notice of the prospect of possible failure of the water main here involved.” (127 N. E. 2d at 772.)

In the instant case there is considerable such evidence, and it has been referred to in detail in other portions of Appellant's briefs on this appeal.

In

Taphorn v. City of Cincinnati, 122 N. E. 2d 307
(Ct. of App. Ohio, 1953),

as appears from the quotation set forth by the City (Appendix “C” p. 12):

“There is no technical or expert testimony in the record as to the life of a cast iron water main, such as was installed here.” (122 N. E. 2d at 308.)

In the instant case there is, of course, considerable, uncontradicted expert testimony concerning the probable life of the cast iron water main installed here, and it is uniformly to the effect that this pipe was “living on borrowed time.” Further, as appears from the same extract set forth by the City, the court there was concerned only with the standards used by prudent operators of a water-works system, not of a warehouse.

In

City of Richmond v. Hood Rubber Products Co.,
190 S. E. 95 (Va. 1937),

the only question was whether the city had the requisite notice that a water meter was defective; it has nothing to do with any duty to inspect or replace water pipes.

In

Midwest Oil Co. v. City of Aberdeen, 10 N. W. 2d 701 (S. D. 1943),

the water main which broke was located *in a street*, and there was no evidence which showed the cause of the break in the pipe. Further, as appears from the extract set forth by the City (Appendix "C" p. 14), in that case there was evidence that the pipe "was of a type that should last for years in excess of the time this main was in the ground." Here, of course, all the evidence is precisely to the contrary. Accordingly, it would appear, in the language of the *Midwest Oil* case, that in the instant case *there was* "occasion for the city either to replace or inspect the pipe following its installation." (10 N. W. 2d at 704).

In

A. Da Prato Company v. City of Boston, 134 N. E. 2d 438 (Mass. 1956),

the pipe had been laid *in the street*, and as appears from the extract set forth by the city (Appellee's Br. p. 14):

"There was no evidence here that the pipe in question . . . was of a kind which after the length of time it had been in the street could not safely be used." (134 N. E. 2d at 439.)

Here, of course, as has been demonstrated, there was uncontradicted and unequivocal testimony to that effect.

Likewise, in

Stein v. City of Newark, 52 A. 2d 66 (Cir. Ct. of Essex Co. N. J., 1947),

the pipe which broke was *at an intersection of two streets*, and as affirmatively appears from the extract set forth by the City (Appellee's Br. p. 15): (1) there was no evidence to indicate what caused the break, and (2)

there was no evidence that a pipe as old as the one which broke could not "safely be used." In the latter connection, in another portion of the opinion, the court stated it was impressed with the rules in Massachusetts, and quoted from a Massachusetts case in which it is noted:

"'Nothing appears to show the ordinary life of the pipe . . .'" (52 A. 2d at 69.)

It should be remembered that in none of the cases cited by the City in its Appendix "C" was it the duty of a warehouseman which was at issue, nor was there proof that the soil in the area of the break was corrosive or that the expected ordinary life of the pipe in such soil had long since expired or had even been reached.

Appellant, in its understandable zeal to distinguish the City's cases, undertook to "Shepardize" them. In so doing Appellant was led to a case not heretofore cited by either party but which is strikingly in point. It is

Yearsley v. City of Pocatello, 210 P. 2d 795
(Idaho 1949).

That case is most instructive on the basic question of what constitutes the use of ordinary care and skill in maintaining water pipes, and, in particular, it holds that a person maintaining water pipes *must* take notice of the expected life of piping in the soil in which it is located and the likelihood that it will become defective and develop leaks so as to cause possible damage.

Although the facts are set forth briefly in the opinion, they are expanded upon in a subsequent opinion rendered by the same court on the second appeal in the same case,

Yearsley v. City of Pocatello, 231 P. 2d 743
(Idaho 1951).

On the first appeal the court reversed the judgment for the plaintiff because of an error in instructions to the jury, but on the second appeal the court reaffirmed its pronouncements made on the first appeal, and affirmed a judgment for the plaintiffs rendered on a trial to the court on the record made in the previous trial and without introduction of any further evidence.

The facts were substantially as follows: The plaintiffs brought an action against the City of Pocatello for damages to their house alleged to have been caused by water negligently escaping from a leak in the City's municipally-owned water plant. They charged that the City failed and neglected to repair and maintain its water system. The City denied that it had been negligent and denied that any leaks occurred in its system and claimed that any damaging leaks were in pipes belonging to the plaintiffs.

There was a substantial conflict in the evidence as to whether the damage was caused by leaks from the water line of the City or from leaks in pipes in a neighbor's adjoining premises. Further, as stated by the court on the first appeal:

"There was testimony that the soil in that vicinity was of such a nature as to be markedly injurious to the pipe; that the average life of pipe, i. e., free from wear and tear, cracks and leaks in that locality was about twenty years, though some had lasted longer and some had corroded through in as short a time as three years; that it was the practice of the City to wait until a leak developed and its existence ascertained before the pipe was replaced or repaired." (210 P. 2d at 796.)

The water line of the City in that particular area had been in the ground some twenty-seven years, and in parti-

cular the pipe in the ground which served the plaintiffs had been there twenty-seven years and was badly corroded, rusted and worn.

The court laid down three applicable rules of law on the first appeal and restated them on the second appeal as follows:

“While a city is not an insurer of the condition of its water system, it is bound to use ordinary care and skill in constructing and maintaining it. *Yearsley v. City of Pocatello, supra.*

Likewise the city is bound to take notice that its pipes are liable to deteriorate from time and use and it must take such measures as ordinary care would dictate to guard against the leaking of its water system due to deterioration of the pipes used in its construction. *Yearsley v. City of Pocatello, supra.*

A city is not liable for damages occasioned by a latent defect in its water system in the absence of notice, express or implied, of such defective condition; it must have actual notice or the defect existed for such a length of time *or* under such conditions that it should have known of the defect. *Yearsley v. City of Pocatello, supra.*” (231 P. 2d at 747; emphasis added.)

On the first appeal the court specifically approved the following instruction, which, it stated, was in line with the point made in the second paragraph of the extract set forth above:

“You are instructed that the defendant, City of Pocatello, was bound to use ordinary care and skill in constructing and maintaining its water system. You are further instructed that that the City of Pocatello was bound to take notice of the life of the

piping and the likelihood of the water pipe used and maintained by the defendant City in serving the plaintiffs' residence, to become defective and to develop leaks and to cause possible damage." (210 P. 2d at 797, Footnote 3.)

The instant case is an *a fortiori* proposition. Here, the City took no notice at all of the life of the piping or the likelihood that it would become corroded, break and cause damage. Here the soil was highly corrosive; the probable life of unprotected cast iron pipe was approximately twenty to twenty-five years in such soil; the pipe had been allowed to remain in the ground 42 years; and the pipe was so located as to cause substantial damage in the event of a rupture. *The City, however, did nothing*; it did not even attempt affirmatively to inform itself fully or at all concerning the probable life of the piping and the likelihood that it would become defective and rupture. The defect here arose under such conditions that the City should have known of its existence. This, therefore, is a clear case of negligent conduct.

VI.

There Is No Merit to the Argument That the City Was Not Negligent Under the Governmental Standard of Care.

Contrary to the assertion by the City (Appellee's Br. p. 36), Appellant did not "ignore" the requirement that under the Public Liability Act notice must be brought to the department authorized to take corrective action, *i.e.*, the Harbor Department in this case. Appellant made the straightforward contention that the requisite notice existed in the Harbor Department (App. Op. Br. pp. 73-76).

Appellant again desires to point out (1) that under all the evidence admitted in this case the trial court committed clear error in not finding that the City failed to exercise even the care required by the governmental standard, and (2) if Appellant's Specification of Error No. 9 concerning the improper admission of an answer to an interrogatory is sustained, an even clearer case exists for determining that the City failed to meet the governmental standard, for the admissible evidence is uniformly to the effect that the City had the requisite notice that its "do nothing" policy constituted a "dangerous or defective condition," which maintenance practice inevitably permitted a "dangerous or defective condition" to arise in the water line and to continue until it caused damage to Appellant's goods.

VII.

There Is No Merit to the Argument That the Exculpatory Clause in the City's Tariff Exonerated the City From Liability.

The contention that the so-called "exculpatory clause" in the City's tariff exonerated the City from liability is wholly devoid of merit for at least six separate reasons.

(1) The short and complete answer to this contention is that a warehouseman such as the City is in this case, may not in anywise impair his obligation to exercise reasonable care. The basic justification for this restraint on the freedom of contract is found in the following maxim:

"Anyone may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement." (Cal. Civ. Code, Sec. 3513.)

The California Warehouse Receipts Act has since its first enactment (Stats, 1909, Ch. 290, Sec. 21, p. 441) provided that a warehouseman (*i.e.*, a person lawfully in the business of storing goods for profit) shall exercise the following care:

“A warehouseman shall be liable for any loss or injury to the goods caused by his failure to exercise such care in regard to them as a reasonably careful owner of similar goods would exercise, but he shall not be liable, in the absence of an agreement to the contrary, for any loss or injury to the goods which could not have been avoided by the exercise of such care.” (Cal. Civ. Code, Sec. 1858.30.)

The full extent to which the proper discharge of that duty is a part of the public policy of the State of California is made evident by Section 1858.12 of that Act, which provides:

“A warehouseman may insert in a receipt, issued by him, any other terms and conditions; provided, that such terms and conditions shall not—

(a) Be contrary to the provisions of this article.

(b) In anywise impair his obligation to exercise that degree of care in the safekeeping of the goods entrusted to him which a reasonably careful man would exercise in regard to similar goods of his own.”

The California Warehouse Receipts Act has so provided since its enactment in 1909 (Stats. 1909, Ch. 290, Sec. 3, p. 437). It has long been the rule in California that warehousemen and other such persons engaging in the business of acting as a bailee for hire by the public may

not by contract exempt themselves from damages resulting from their own negligence.

England v. Lyon Fireproof Storage Co., 94 Cal. App. 562, 571-572, 271 Pac. 532 (1928); and *Morse v. Imperial G. & W. Co.*, 40 Cal. App. 574, 576, 181 Pac. 815 (1919).

In the *England* case the court had occasion to consider this precise problem and it announced the following rule for California:

“But a warehouseman may not limit his liability for damage or loss of goods stored with him for hire, so as to exempt himself from damages resulting from his own negligence, nor to relieve himself from the exercise of ordinary care. The trend of modern authorities holds that such an effort on the part of a bailee to exempt himself from negligence is contrary to public policy [citing cases and other authorities]. Section 21 of the California Warehouse Act (Stats. 1909, p. 436), provides: ‘A warehouseman shall be liable for any loss or injury to the goods caused by his failure to exercise such care in regard to them as a reasonably careful owner of similar goods would exercise.’” (94 Cal. App. at 571-572).

The various reasons why the courts in cases similar to the instant one refuse to uphold agreements to secure exemption from liability for loss or damage caused by negligence, are set forth in

Bisso v. Inland Waterways Corporation, 349 U. S. 85, 75 S. Ct. 629 (1955),

a case decided under admiralty law, but which has more general application. That case points out that these ex-

culpatory clauses are held invalid (1) to discourage negligence by making wrongdoers pay damages, and (2) to protect those in need of goods or services from being overreached by others who have power to drive hard bargains.

As is demonstrated above, the California courts and the California legislature have seen fit to apply those principles, and have announced a rule that warehousemen and other such bailees offering their services for hire to the public may not exempt themselves from liability for damages resulting from their own negligence nor relieve themselves from the duty to exercise reasonable care.

(2) As the City recognizes, the trial court made no findings on this claimed defense. One crucial and necessary allegation made by the City concerning this defense involves Appellant's "awareness" of the exculpatory clause. The Court may not affirm the judgment on the basis of this defense as there had been a failure to make a finding of fact on that critical issue.

Stokes v. Reeves, 245 F. 2d 700, 702 (C. A. 9th 1957);

Deering-Milliken & Co. v. Modern-Aire of Hollywood, 231 F. 2d 623, 627 (C. A. 9th 1956).

Moreover, there is no evidence at all on this crucial question of Appellant's "awareness." Consequently, the only permissible finding is that Appellant had no such "awareness" as will bind it in accordance with the alleged terms of the exculpatory clause.

(3) Another clear defense to this contention is that the Appellant is not bound by the alleged terms of the exculpatory clause for the reason that it was not a party to the contract. Preferential Berth Assignment No. 105

[Ex. D]⁷ was entered into between the City and another corporation not a party to this action. Applicable, therefore, is the holding of

California & Hawaiian Sugar R. Corp. v. Harris County, etc. Dist., 27 F. 2d 392 (S. D. Tex. 1928),

where the court stated:

“ . . . [T]he evidence is affirmative that these [exculpatory] provisions were never called to the plaintiff's attention. Such knowledge as the plaintiff had of them was that only which the law imputes to him from the fact that these tariffs were in the hands of the steamship company, which, in unloading the goods, acted as its agent, and such imputed knowledge cannot avail to bring home to the bailor that claimed exemptions from negligence in view of the fact (1) that they do not in terms seek to exempt from negligence, and (2) they are inserted in a general tariff, in which, since the law presumes responsibility for acts of negligence, in the absence of defendant's notice to the contrary, the plaintiff would not be expected to look for such exemption.” (27 F. 2d at 394.)

A California decision to the same effect is

Fields v. City of Oakland, 137 Cal. App. 2d 602, 608-609, 291 P. 2d 145 (1955).

The City, however, makes the illogical argument that because Appellant was not a party to Preferential Berth

⁷Appellee refers to Exhibit D, Preferential Berth Assignment No. 105 (Appellee's Br. p. 44). That exhibit, however, although marked for identification [R. 121], was never received in evidence, and is not a part of the record on this appeal. [R. 492.]

Assignment No. 105, the presence of its goods on the premises “was unlawful” and Appellant “was a trespasser or gratuitous licensee” (Appellee’s Br. p. 44). The City’s attempted dichotomy is improper. As appears from the Tariff, a preferential assignee is expected to place the goods of third parties on the City’s docks and in the warehouses located there. Hence Appellant is a member of the public who is expected to be present on the premises under the terms of the contract made between the City and the preferential assignee. Appellant, therefore, was neither a trespasser nor a gratuitous licensee, and it is not bound by a contract to which it was not a party.

(4) Another short answer to the contention is that the provisions of Tariff Item 535(b), properly construed, do not exculpate the City for liability for its own negligence. The rules of construction applicable to exculpatory clauses were summed up in

Sproul v. Cuddy, 131 Cal. App. 2d 85, 280 P. 2d 158 (1955),

as follows:

“Except where discountenanced by public policy or some statutory inhibition, a party may contract to absolve himself from liability for negligence; the law, however, looks with disfavor on such attempts to avoid liability or secure exemption from one’s personal negligence, and construes such provisions strictly against the person relying on them, especially when he is the author of the document; to be sufficient as an exculpatory provision against one’s own negligence, the party seeking to rely thereon must select words or terms clearly and explicitly expressing that this was the intent of the parties; and seemingly broad language will not be isolated from

its context and will be read with due regard to the maxim of strict construction.” (131 Cal. App. 2d at 95.)

The language in Tariff Item 535(b) is obviously quite broad, but it does not by its terms refer to “negligence,” and it does recognize that in some circumstances liability will exist. Most apt, therefore, is the following quotation from

Basin Oil Co. v. Baash-Ross Tool Co., 125 Cal. App. 2d 578, 271 P. 2d 122 (1954):

“As stated in *Pacific I. Co. v. California, etc., Ltd.*, *supra*, ‘“the provision of a contract relieving one of the parties thereto from liability for his or its own negligence should be clear and explicit. While it is true that the language used in the quoted provision of the contract before us, that the agent shall hold the company ‘harmless from all claims, suits, and liabilities of every character whatsoever and howsoever arising from the existence or use of the equipment at said station’ is broad and comprehensive, it is, as stated by the court below, provocative of some doubt. The defendant itself wrote the provision into the contract for its own benefit. It could have plainly stated, if such was the understanding of the parties, that the plaintiff agreed to relieve it in the matter from all liability for its own negligence.” ’ ” (125 Cal. App. 2d at 595.)

(5) Still another answer to the contention is the fact that if Preferential Berth Assignment No. 105 were before this Court it would show that Paragraph 4 thereof provides that the agreement is “subject to the charter of the City of Los Angeles and to the orders, rules and regulations of the Board of Harbor Commissioners and

the ordinances of said city adopted in pursuance of said charter.” That paragraph, therefore, is the sole vehicle by which the so-called exculpatory clause found in Tariff Item 535 (b) (which is in City Ordinance No. 97,629) is imported into the Preferential Berth Assignment agreement. That agreement was entered into in 1946 and four years later the City enacted the said Ordinance No. 97,-629. Certainly it cannot be argued that by virtue of the said paragraph 4 of the agreement the parties intended that the City could at a later date unilaterally insulate itself from liability for its own negligence in these warehousing operations. In this connection, if Preferential Berth Assignment No. 105 were before this Court, paragraph 2 thereof would disclose that the City agreed that it would “at all times, at its own cost and expense, keep and maintain said wharf in good and safe condition of repair; . . .”

(6) A further answer to the contention is that Tariff Item 535 (b) is unconstitutional and void insofar as it purports to exempt the City from liability for negligence. California Constitution, Article XI, Sec. 8, provides that municipalities “may make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws.” It is well settled in California that the liability of municipalities for the tortious acts of their servants appertains to the “general laws” and is not a “municipal affair.”

Dept. of Water & Power v. Inyo Chem. Co., 16 Cal. 2d 744, 753, 108 P. 2d 410 (1940); and *Douglass v. City of Los Angeles*, 5 Cal. 2d 123, 128, 53 P. 2d 353 (1935).

It follows, therefore, that paragraph 4 of Preferential Berth Assignment No. 105 did not incorporate Tariff Item 535 (b); it was not adopted "in pursuance" of the City charter because the charter empowered the City to legislate only with respect to municipal affairs.

VIII.

The Admission of the City's "Additional" Answer to Plaintiff's Interrogatories Was Both Erroneous and Prejudicial.

The City argues, *inter alia*, that even if it is assumed that the "additional" answer should not have been received in evidence, it is to be presumed that the trial court did not consider it. Obviously any such presumption is not conclusive. In this connection the City relies upon

Thompson v. Baltimore & O. R. Co., 155 F. 2d 767, 771 (C. C. A. 8th 1946),

which cites and quotes from

Thompson v. Carley, 140 F. 2d 656, 660 (C. C. A. 8th 1944).

In the *Carley* case the court noted that there was nothing in the record to show that any finding of fact was based upon the challenged testimony, and stated:

"This Court will not reverse a trial court in a non-jury case for having admitted incompetent evidence, whether objected to or not, unless all of the competent evidence is insufficient to support the judgment appealed from *or* unless it affirmatively appears from the record that the incompetent evidence complained of was relied upon by the trial court and induced the court to make an essential finding which would not otherwise have been made." (140 F. 2d at 660; emphasis added.)

As is demonstrated in Appellant's Opening Brief, pp. 76-80: (1) there is no competent evidence to the same effect as that contained in the "additional" answer to interrogatories here admitted in evidence, *and* (2) it is clear that the trial court relied upon this incompetent evidence in making findings of fact vitally affecting its conclusions in this case.

The City seeks to find some support in the testimony of its plumber foreman, Brashier. (Appellee's Br. p. 46) As was demonstrated, however, in another portion of this reply brief (*supra*, pp. 19-20), his testimony may not be cited for the proposition that there had been no corrosion failure in the immediate area of Berth 59.

The City attempts to justify its use of its own answer to an interrogatory propounded under Rule 33 by pointing out that Rule 33 provides that such answers may "be used to the same extent as provided in Rule 26 (d) for the use of the deposition of a party." The City then argues that Rule 26(d)(4) provides that if only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce all of it which is relevant to the part introduced, and any party may introduce any other parts.

It is immediately apparent that the language of Rule 26(d) is to some extent inapposite to the interrogatory procedure under Rule 33. For example, there is no provision for anyone other than the answering party to be present or represented at the time the interrogatories are answered. Further, as this Court noted in

Haskell Plumbing & Heating Company v. Weeks
237 F. 2d 263, 267 (C. A. 9th 1956),

Rule 26(d) permits the use of depositions or portions thereof, "but only 'so far as admissible under the rules

of evidence.’” (237 F. 2d at 267.) Answers to interrogatories are admissible as admissions against the answering party, but as pointed out in Appellant’s Opening Brief, pages 78-80, because they are self-serving hearsay evidence they are not under the rules of evidence admissible on behalf of the answering party if there is an objection.

As noted in Appellant’s Opening Brief, page 77, footnote 1, this “additional” answer was entirely voluntary. It was not made after the granting of a motion for leave to amend its answer. No such motion was made. The City (which did not even include in the “additional” answer the reason for the correction) made this gratuitous attempted retraction, and then at the trial, when Appellant made proper use of the admission made in the original answer, the City was allowed over objection to put the retraction in evidence.

The City now argues that Appellant should have submitted additional interrogatories if it wished to ascertain the reason for the corrected answer. The City, however, cites no authority in support of its attempt to transfer to Appellant the burden of disproving the truth of an admittedly self-serving hearsay statement. If the City wished to disavow or retract its admission, it should have done so by the usual process of putting its witnesses on the stand so that they could be subjected to the test of cross-examination.

Answers to interrogatories under Rule 33 are much like responses to requests for admission under Rule 36. Professor Moore states as to those responses:

“Answers to requests are not subject to cross-examination; except insofar as they constitute admissions against the interest of the answering party,

they should stand on no better footing than affidavits, which cannot be used as substantive evidence at a trial.” (4 Moore’s Federal Practice [2d ed.] Par. 36.09, p. 2730.)

IX.

Conclusion.

Appellant submits that the City has not presented any reason which justifies the “do nothing” policy doggedly adhered to in the circumstances of this case. Without attempting to summarize completely Appellant’s views, it is apparent that the City either had actual knowledge that graphitic corrosion was occurring in pipelines at Berth 59, or it buried its municipal, proprietary head, ostrich-like, and voluntarily failed to avail itself of the tremendous fund of useful knowledge readily available concerning the corrosive character of the soil in the area of Berth 59 and the vulnerability to graphitic corrosion of the unprotected cast iron pipe which it had installed in such soil. The City simply installed the pipeline in 1914 and then for 42 years did nothing except fix breaks as and when they occurred.

The City complains in purported justification of its conduct that it was “uneconomical” and “impractical” for it to make adequate inspections of its pipelines in the area. But the City did not even maintain a reasonably vigilant lookout for water on the surface so that it could quickly implement its only maintenance policy in time to prevent damage. It did not (as it was bound to do under the evidence and the authorities) take notice that the pipe was liable to deteriorate from time and use; it did not even attempt to estimate the probable life of such pipe in the soil in the area of Berth 59 so that it could replace such

pipe just prior to the expiration of its ordinary life in such soil.

The City's conduct was clearly negligent by any standard, governmental or proprietary, and the trial court committed reversible error in determining that the City was not under any obligation to provide a safe place for the storage of Appellant's goods, and in proceeding to test the City's conduct by the governmental standard of care rather than by the correct proprietary standard.

It is submitted that the improperly admitted evidence in the form of a self-serving answer to an interrogatory was prejudicial error. It is further submitted that each of the findings of fact which is the subject of a specification of error on this appeal is "clearly erroneous," and that upon a review of the entire evidence this Court should be left with the definite and firm conviction that a mistake has been committed by each such finding, any one of which is sufficiently crucial to this case as to warrant a reversal of the judgment. Further, Appellant submits that if its contentions are sustained, it would be proper in the circumstances of this case for the Court to direct entry of judgment for plaintiff on the question of liability.

Respectfully submitted,

PHILLIP K. VERLEGER,

JACK T. SWAFFORD,

HOWARD J. PRIVETT,

MCCUTCHEN, BLACK, HARNAGEL & SHEA,

Attorneys for Appellant.

December 18, 1959.

No. 16388
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

GRACE & Co. (Pacific Coast), a corporation,
Appellant,
vs.
THE CITY OF LOS ANGELES, a municipal corporation,
Appellee.

PETITION FOR REHEARING.

MCCUTCHEN, BLACK, HARNAGEL & SHEA,
PHILIP K. VERLEGER,
JACK T. SWAFFORD,
HOWARD J. PRIVETT,
727 West Seventh Street,
Los Angeles 17, California,
*Attorneys for Appellant
and Petitioner.*

FILED

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vs.

THE CITY OF LOS ANGELES, a municipal corporation,

Appellee.

PETITION FOR REHEARING.

*To the Honorable Stanley N. Barnes, Oliver D. Hamlin,
Jr. and Gilbert H. Jertberg, Circuit Judges, United
States Court of Appeals for the Ninth Circuit:*

Appellant Grace & Co. (Pacific Coast), a corporation, hereby petitions this Court for a rehearing of its decision and judgment entered herein April 14, 1960, affirming a judgment of the United States District Court for the Southern District of California, Central Division.

Appellant respectfully petitions for a rehearing in this case upon the following grounds:

(1) The Court erred in concluding that the judgment could be affirmed merely because in its opinion there is sufficient evidence to support a finding that appellee was not negligent under the proprietary standard of care.

(2) The Court erred in concluding that the evidence would support a finding of no negligence on either the

proprietary or governmental standard of care, and, in particular, erred in considering the evidence of the standard of care (or, more accurately, the lack thereof) practiced by water companies and in holding it to be evidence of due care under the circumstances here presented.

(3) The Court erred in concluding that appellee was entitled to put its “additional answer” to Interrogatory No. XIV(b) in evidence.

ARGUMENT.

I.

The Court Erred in Concluding That the Judgment Could Be Affirmed Merely Because in Its Opinion the Evidence Would Support a Finding That the City Was Not Negligent Under the Proprietary Standard.

This Court in its opinion notes the extreme divergence of views between appellant and appellee as to whether appellee in its operation of the warehouse (including the water line which failed) was acting in a proprietary capacity or in a governmental capacity. Appellant contends for application of the higher proprietary standard of care, whereas appellee espouses the application of the much lower governmental standard, narrowly prescribed by the California Government Code, Section 53051. This Court states concerning that issue:

“The District Court found on this issue in accordance with the contentions of appellee. We hold that under either view the District Court’s finding of no negligence on the part of appellee, supported as it is by ample evidence, is dispositive of the issue of liability.” (p. 8)

As appellant construes that language, it means that even if appellant were correct in its contention that appellee's conduct should be scrutinized by the higher standard of care applicable to a proprietary activity, it avails appellant nothing for the reason that this Court holds there is "ample" evidence of the lack of negligence under either standard. Appellant submits that in so holding this Court is applying a palpably erroneous rule of law. Appellant submits that it is entitled to have the trier of fact pass upon whether or not appellee acted negligently in the light of the higher proprietary standard of care. In the circumstances of this case this Court cannot (and did not purport to) find as a fact that appellee's conduct was not negligent under the higher standard. If the proprietary standard is applicable (and appellant contends that as a matter of law it is), this Court must reverse the judgment so that the trier of fact may make a finding on this issue, an issue which in the view the District Court took of this case it found unnecessary to decide. Properly construed, the findings here are to the effect only that appellee did not fail to exercise that degree of care required under the governmental standard. The findings are no broader than that.

As was noted in Appellant's Opening Brief (pp. 36-37), it is solely a question of law whether under a given set of facts of a municipality is performed as part of a governmental function or as part of a proprietary activity.

Carr v. City & County of San Francisco, 170 Cal. App. 2d 48, 52, 338 P. 2d 509 (1959);

Barrett v. City of San Jose, 161 Cal. App. 2d 40, 42, 325 P. 2d 1026 (1958).

The cases cited by appellant (App. Op. Br. pp. 37-39) conclusively demonstrate that insofar as concerns the conduct here involved, appellee was acting in its proprietary capacity as a warehouseman.

As stated in Appellant's Opening Brief (p. 37), there can be no dissent from the proposition that an appellate court is always concerned with whether the trial court arrived at and applied a proper standard of care in a particular case.

Maragakis v. United States, 172 F. 2d 393 (10th Cir. 1949);

Clinkscales v. Carver, 22 Cal. 2d 72, 76, 136 P. 2d 777 (1943).

As pointed out in Appellant's Opening Brief (pp. 40-41), the prejudicial and reversible nature of an error in testing conduct by an inapplicable standard of care, was recognized by the Court of Appeals for the Tenth Circuit in

Maragakis v. United States, 172 F. 2d 393 (10th Cir. 1949).

In that case, the Court reversed trial court judgments in an auto accident case, and the trial court was directed to assess damages and enter judgment accordingly. The Court said, at page 395:

"The trial court, of course, has the right and duty to judge and appraise human conduct and behavior as applied to factual circumstances, and we are not warranted in overturning its appraisal of the facts when judged by the applicable standard of care, unless we are convinced that its judgment is clearly erroneous. We think, however, in this case that the trial court misconceived the standard of care by which

the negligence of the Government driver is to be judged, and in so doing failed to correctly appraise the facts in the light of the legal duty.”

If the instant case had been a jury case and the Court had instructed the jury that they should apply the governmental standard of care, appellant thinks it plain that this Court could not (and would not) have affirmed a judgment for appellee unless it were convinced the governmental standard of care were the correct applicable standard. Certainly, therefore, it should *clearly appear* that the trial court found appellee not negligent under both standards before this Court can undertake to affirm the judgment. The findings here do not so clearly indicate, and, as appellant reads the opinion of the Court (particularly the portion above quoted), this Court is in agreement with appellant on that narrow question.

II.

The Court Erred in Concluding That the Evidence Would Support a Finding of No Negligence on Either the Proprietary or the Governmental Standard of Care, and in Particular, Erred in Considering the “Evidence” of the Standard of Care Practiced by Water Companies.

Although this Court did not in its opinion recite all the evidence in this case, appellant knows of no evidence adverse to it which was omitted. Appellant submits that the evidence so recited is not ample evidence supporting a finding of no negligence under either the governmental or the proprietary standard of care, and particularly under the latter, higher standard.

The cornerstone of the “evidence” relied upon by this Court as supporting the judgment of the trial court is the testimony that the custom in other municipalities in Cali-

fornia (engaging in distribution of water, not warehousing) was, as in Los Angeles, "that after installation of the cast iron pipe it was used without inspection or replacement until there were sufficient breaks to indicate the pipe had corroded or become undependable." (Op. pp. 5-6). This Court holds that testimony to that effect is evidence of due care in this case. Appellant submits that it is clear error for this Court to so hold and that the authorities cited by appellant in its briefs rather clearly demonstrate that error.¹

Preliminarily, it must be remembered that appellant contends that the proprietary function here involved is that of the operation of a warehouse, not merely the operation of water lines, which lines are but one minor aspect of the warehousing operations engaged in by appellee at Los Angeles Harbor. The evidence of custom referred to by this Court in its opinion (pp. 5-6) is not evidence which supports the judgment in this case, for the following reasons:

(1) As noted in Appellant's Opening Brief (pp. 64-67) it is settled that conformity by a party to a general custom with relation to the manner of maintaining certain equipment does not excuse the party *unless the practice is consistent with due care*.

Complete Ser. Bur. v. San Diego Med. Soc., 43 Cal. 2d 201, 214, 272 P. 2d 497 (1954);

Polk v. City of Los Angeles, 26 Cal. 2d 519, 159 P. 2d 931 (1945);

Sheward v. Virtue, 20 Cal. 2d 410, 414, 126 P. 2d 345 (1942).

¹Appellant's discussion of the irrelevance of this evidence of custom may be found in its Opening Brief, pp. 65-72, and in its Reply Brief, pp. 24-30.

The practice of doing nothing cannot in the circumstances of this case be held to be consistent with due care on the ground other persons do nothing. As stated in the *Sheward* decision:

“More recently in *Mehollin v. Ysuchiyama*, 11 Cal. 2d 53, 577 [77 P. 2d 85], this court said that one may not justify a failure to use ordinary care by showing that others in the same business practiced a similar want of care.” (20 Cal. 2d at 414.)

(2) Of even more significance, the evidence in this case is not evidence of the “care” practiced by others in the same business; it is evidence only of the practice of water companies, companies whose operations can in no wise be said to be similar to the operation of a warehouse for the storage of valuable goods. All the authorities recognize that custom is relevant only when it is evidence of custom “in the same trade or occupation,” or the practice of others “similarly situated” or the practice of others “performing similar acts under similar conditions.”

Sheward v. Virtue, 20 Cal. 2d 410, 414, 126 P. 2d 345 (1942);

Reagh v. S. F. Unified School District, 119 Cal. App. 2d 65, 70, 259 P. 2d 43 (1953);

2 Witkin, Summary of California Law, pp. 1764-1765.

It should be mentioned that the principal case cited by this Court,

Williams v. Long Beach, 42 Cal. 2d 716, 268 P. 2d 1061 (1954),

is not inconsistent with appellant’s position concerning the irrelevance of this testimony of custom. That case did not deal with the admissibility or effect of evidence of

custom, and, as a matter of fact, all that occurred there is that the court in its opinion merely observed that there was testimony that there was no known practice of testing a gas pipe for strain while it is still in place. The Court concluded that in view of that and other facts the trial court could properly find that the leak in the pipe was due to natural causes and that it could not reasonably have been anticipated. In our case, of course, had the Harbor Department been alert to its legal responsibilities as a warehouseman to keep abreast of current matters affecting its warehousing operations (App. Op. Br. pp. 58-62) it could have ascertained the corrosive nature of the soil in which the pipe was laid and the probable sharply curtailed life of the pipe in such soil. Further, as to the *Williams* case it should be mentioned that the testimony there, adverted to above, is not at all the equivalent of testimony as to what standard of care (or lack thereof) is followed in maintaining pipe lines, which is the true nature of the irrelevant testimony here involved.

(3) It is clear from the record in this case that the evidence of the custom of water companies has no probative value here for the further reason that it is firmly embedded in economic considerations. (See App. Op. Br. pp. 67, 69.) It is a custom which has derived its life and meaning solely from considerations of cost to the water companies and not from considerations of the hazard to third parties. It has, therefore, no proper place in determining negligence or the lack thereof.

Redfield v. Oakland C. S. Ry. Co., 112 Cal. 220,
43 Pac. 117 (1896);

35 Cal. Jur. 2d Negligence, Sec. 189, pp. 706-
707;

Restatement of the Law of Torts, Sec. 283(d);
Prosser, Law of Torts (2d ed., 1955), 119, 129.

This is forcefully illustrated in the *Redfield* case, where the Court upheld the rejection of expert testimony on the general custom as to the number of men used in operating an electric street railway car, stating:

“But, . . . custom may originate *in motives of economy, or the stress of pecuniary affairs*, or in recklessness, and not from considerations based upon the proper discharge of their duty toward others using their cars.” (112 Cal. at 224, 225; emphasis added.)

Analyzed in this light, the deliberate decision made by appellee in this case on economic grounds not to do anything until water appeared on the surface, is by definition a failure to meet the requisite standard. Appellee looked exclusively to its own interest and ignored completely the risk to the goods it was bound to protect.

Nor does the other evidence cited by this Court in its opinion provide any support for a finding of no negligence under any standard of care. In this connection appellant continues to hold to what it deems a logical view that the mere fact that cast iron pipe has lasted 150 years in Philadelphia in soil about which the record of this case discloses nothing, is of no assistance in the determination of the issue of negligence in this case.

Further, in appellant's view it is impossible as a matter of logic to conclude from Mr. Montgomery's testimony [R. 326-327] that those portions still in use of the pipe laid in 1852 by the water company with which he was once connected, are portions which are in corrosive soil. The evidence, appellant submits, is not in such a state as establishes that fact one way or the other.

Nor is the experience of the Water Department of the City of Los Angeles with respect to its parallel and

adjacent lines under Signal Street of any value whatsoever in determining whether appellee was negligent in its operation of its warehousing facilities. This Court in its opinion carefully insulates the Harbor Department from any consequences arising out of the knowledge acquired by the Water Department to the effect that the general area of Signal Street was highly corrosive. The Court does this on the ground that the results of the corrosion tests were never communicated to the Harbor Department. Likewise, therefore, appellant submits that in the interests of consistency the experience of the Water Department, which upon the record was never communicated to the Harbor Department, is no support for any finding of lack of negligence.

This leaves, therefore, as the only relevant evidence on the issue of lack of negligence (other than the very limited experience of the Harbor Department itself) the testimony of the experts that the life of cast iron pipe in highly corrosive soil is from 10 to 20 or 25 years. Appellant submits that the action of appellee in intentionally leaving this pipe in the ground for approximately 42 years in the proximity of its warehouse filled with valuable goods was plainly negligent conduct, and that the judgment should therefore, be reversed.

III.

The Court Erred in Concluding That Appellee Was Entitled to Put Its "Additional Answer" to Interrogatory No. XIV(b) in Evidence.

Although this Court readily agrees that normally a party may not introduce his self-serving answers to an opponent's interrogatories, it lets down that safeguard so as to permit a corrected answer when the opponent first

introduces the original answer.² Appellant submits that this holding is not supported by the authorities cited by the Court, and that under the facts of this case it was plain error for the trial court to have allowed such a corrected answer in evidence at the instance of appellee.

Preliminarily, it should be noted (1) the additional answer did not tend merely to "explain"; it retracted the original answer in its entirety and gave a flatly contradictory answer; (2) the additional answer did not set forth the reason why the original error had been made; and (3) it was filed without leave of court.

Appellant submits that this problem is one of great concern to the bar generally, and one upon which, admittedly there is no direct authority. Under the rule as announced here, any party may file an answer to an interrogatory and then subsequently, if he becomes dissatisfied with it for any reason, or believes that it requires further explanation or correction in the light of counsel's later fuller understanding of the case and its issues, the party may *without leave of Court* file a further, additional answer well larded with self-serving statements, and thereby effectively deprive his opponent of the effect of the original admission *and* of his right of cross-examination as to the statements in the additional answer.

Certainly, before a party may so effectively purify his original answer to an interrogatory he should proceed by way of motion and upon a proper showing which brings out all the relevant facts concerning why a *new and different* answer is required. This burden of clearing up

²It would be noted that in the last sentence of the opinion dealing with this specification of error (p. 8), the Court inadvertently used "appellant" where it should have used "appellee" and "appellee" where it should have said "appellant."

the inconsistency between two answers to the same interrogatory should not be unceremoniously cast upon the opponent at the trial as he is in a poor position to make the explanation.

The Court cites three authorities in support of its holding on this specification of error, including

4 Moore's Federal Practice (1950 ed.), Par. 33.29 (2).

It is important to observe that that paragraph of Moore's treatise does not deal with admissibility of answers to interrogatories, whereas an earlier paragraph (Par. 33.29 (1)) does. The cited paragraph, which quotes from the two cases cited by this Court, deals only with the extent, if any, to which answers to interrogatories have the effect of limiting a party's proof. Moore discusses and quotes from both the cases cited by the Court here:

RCA Mfg. Co. v. Decca Records, 1 F.R.D. 433 (S.D. N.Y. 1940);

McInerney v. Wm. F. McDonald Const. Co., 35 Fed. Supp. 688 (E.D. N.Y. 1940).

Moore correctly notes that in the *RCA* case, a trademark infringement and unfair competition case, one of the defendants objected to certain interrogatories propounded by plaintiff, on the ground that they sought to limit the defendants' proof. Said the Court there in the passage quoted by Moore:

"I do not conceive that this is a function of interrogatories. So far as the interrogatories require the production of information defendants must disclose whatever information it now has as demanded by the

interrogatories. If in the interim, between the time of the answers to these interrogatories and the trial, defendants obtain further information, *they will not be prevented from offering such further information on the trial* and should under this interrogatory furnished it to plaintiff when it is obtained.” (p. 435; emphasis added.)

Initially, it is obvious from that ruling that the court there was concerned solely with “further information” and not with *contradictory* information. And, of prime importance, it should be observed that the case did not deal in any way with the admissibility of an answer to an interrogatory; it dealt with whether an interrogatory should be answered and how it should be answered. The Court merely held that plaintiff should be supplied “further information” when obtained *and expressly recognized that defendants (the answering parties) could offer such information on the trial*. In the instant case that is all appellant sought, *i.e.*, that appellee be required to offer such information on the trial and in the ordinary way through witnesses who could be cross-examined. The Court there did not hold or in any way intimate that the further information would be admissible at the instance of the defendants if on the trial plaintiff should offer the first answer.

In the *McInerney* case a defendant in a patent suit made a motion to restrict plaintiff to dates not earlier than specified dates for conception, disclosure and reduction to practice, which dates were first specified in plaintiff’s answers to defendant’s interrogatories. On the argu-

ment of that motion plaintiff stated that it was preparing a cross-motion to permit the filing of amended answers, the effect of which would be to establish earlier dates of conception, disclosure and reduction to practice. The trial court withheld ruling on the first motion until the second was filed and referred to the judge hearing the first motion. In granting plaintiff's motion to file amended answers to interrogatories, the Court said:

“Speaking generally, there is no apparent reason why a witness should not be permitted to correct or amend his testimony, and that occurs frequently at trial before a court or jury; no good reason has been shown for not permitting the same practice where the witness is being examined under deposition, and quite naturally the trier of the facts must be apprized of the exact change in testimony, so that the apparent reasons for such change may be given due weight in the appraisal of that witness's testimony in its entirety.” (p. 689)

That case, therefore, had not progressed to the point where the defendant offered the original answers and the plaintiff countered with his amended answers. Further, the amended answers were filed *after motion and with leave of Court*. Moreover, the above quotation makes it crystal clear that the trier of the facts must be apprized of the reasons for the change so that they may be considered in determining the due weight to be given the answers in their entirety. Here, of course, the amended answer was filed without leave of Court and did not assign any reason at all for the change, other than that the prior information was in error.

At no time did appellant seek to limit appellee's proof, or to have the Court rule that appellee was "bound" by its original answer to the interrogatory. Appellant contended only that the additional answer was inadmissible when offered by appellee. The additional answer was filed without leave of Court and was wholly uninformative concerning the reasons for the change or the basis upon which the corrected answer was predicated. Appellant had no knowledge concerning those matters. Appellant merely insisted that in those circumstances appellee should proceed in the normal way and put its evidence in by witnesses who could be subjected to cross-examination, the best crucible yet devised for ascertaining the truth of a matter. Appellee chose not to proceed in the usual way, and instead, over appellant's objection, put in evidence its own self-serving, additional answer to an interrogatory. This, appellant submits, was clear error, without support in the authorities and in direct conflict with the well-settled principles relating to the admissibility of self-serving hearsay evidence.

Appellant submits that the prejudicial nature of this erroneously admitted evidence is fully demonstrated in its briefs on this appeal (App. Op. Br. pp. 76-80; App. Rep. Br. pp. 48-51). In that connection it should be added that this Court itself in its statement of facts (Op. p. 5) stated the facts in accordance with the improperly admitted additional answer to appellant's interrogatory.

Conclusion.

Appellant submits that the matters raised in this petition for rehearing present sound reasons for the granting of the petition so that further consideration may be given to the proper resolution of the issues before the Court on this appeal.

Respectfully submitted,

McCUTCHEM, BLACK, HARNAGEL & SHEA,
PHILIP K. VERLEGER,

JACK T. SWAFFORD,
HOWARD J. PRIVETT,

Attorneys for Appellant and Petitioner.

Certificate of Counsel Pursuant to Rule 23.

It is hereby certified that in our judgment the foregoing petition for rehearing is well founded and that it is not interposed for delay.

Respectfully submitted,

McCUTCHEM, BLACK, HARNAGEL &
SHEA,

PHILIP K. VERLEGER,
JACK T. SWAFFORD,
HOWARD J. PRIVETT,

By JACK T. SWAFFORD,

*Attorneys for Appellant and
Petitioner.*

No. 16389✓

**United States
Court of Appeals**
For the Ninth Circuit

THE STATE OF NEVADA, Ex Rel Hugh A.
Shamberger, State Engineer,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

**Supplemental
Transcript of Record**

**Appeal from the United States District Court
for the District of Nevada**

FILED

OCT -7 1959

PAUL P. O'BRIEN, CLERK

No. 16389

United States
Court of Appeals
For the Ninth Circuit

THE STATE OF NEVADA, Ex Rel Hugh A.
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the District Court of the United States
for the District of Nevada

No. 1247

THE STATE OF NEVADA, Ex Rel HUGH A.
SHAMBERGER, State Engineer,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

PETITION FOR REMOVAL

To the Honorable Judge of the District Court
of the United States for the District of Nevada:

Comes now the Attorney General of the United
States of America, acting by and through J. Lee
Rankin, Asistant Attorney General, and William
H. Veeder, Attorney, Department of Justice, and
respectfully alleges:

I.

There was served on the United States of
America on December 7, 1955, a pleading designated
Complaint for Declaratory Judgment filed by the
State of Nevada in the Fifth Judicial District
Court of the State of Nevada, in and for the County
of Mineral.

II.

The State of Nevada by its complaint seeks a
declaratory judgment "for the purpose of securing
the judicial determination of its rights, status and

legal relations under its laws pertaining to the appropriation to beneficial use of the underground waters of said state by the United States and its government * * *.”¹

III.

It is alleged in the complaint that the United States of America prior to 1935² established the United States Naval Ammunition Depot, near the town of Hawthorne, Mineral County, State of Nevada; that a portion of the land was ceded to the United States of America by the Treaty of Guadalupe Hidalgo in 1848 except those parcels that passed into private ownership; upon the admission of Nevada into the Union in 1864, it is alleged that “the United States neither by Act of Congress or by stipulation then, nor by any applicable Act of Congress thereafter, reserved any jurisdiction ousting the jurisdiction of the applicable laws of the state pertaining to ownership and the use of the waters thereof including the area comprising said depot.”³

IV.

It is further alleged in Nevada’s complaint that its Legislature ceded to the Federal Government jurisdiction over the lands comprising the United States Naval Ammunition Depot here involved “but not over the corpus of the water nor the application

¹Complaint for Declaratory Judgment, page 1.

²Complaint for Declaratory Judgment, par. I, page 1.

³Complaint for Declaratory Judgment, par. I, pages 1, 2.

of its laws providing for the beneficial use thereof, reserving in Section 3 thereof the right to serve any of its criminal or civil process within the area for any cause there or elsewhere in the state arising, where such cause comes properly under the jurisdiction of the state laws.”⁴

V.

Reviewed at length in the Complaint for Declaratory Judgment is the “Act Relating to Underground Waters, the same being Chapter 178, Statutes of Nevada, 1939”;⁵ it is then averred that the law last mentioned is in full force and effect and that “ ‘The water of all sources of water supply within the boundaries of the state, whether above or beneath the surface of the ground belongs to the public.’ ”⁶ Reference is then made to the requirement that application must be made to the State Engineer for a permit to appropriate the waters within the state for a beneficial use.⁷

VI.

It is then alleged by Nevada that on or about the 15th day of February, 1942, and at various

⁴Complaint for Declaratory Judgment, par. II, page 2.

⁵Complaint for Declaratory Judgment, par. III (a), (b), (c), (d), pages 2, 3, 4.

⁶Complaint for Declaratory Judgment, par. IV, page 4.

⁷Complaint for Declaratory Judgment, par. IV (a), (b) 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, pages 4, 5, 6, 7, 8.

times thereafter up to and including the 15th day of September, 1945, the United States of America, being represented by the Commanding Officer of the United States Naval Ammunition Depot, referred to above, allegedly caused to be drilled certain wells; that the water from those wells was for the "beneficial consumptive use" of the Ammunition Depot; that subsequent to the completion of the wells, in the year 1949, filings were made with the State Engineer's Office for permits to appropriate the waters from the wells and that permits were issued pursuant to those filings.⁸

VII.

It is averred that extensions of time granted by the State Engineer to make proof of application of water to beneficial use expired on the 27th day of July, 1955;⁹ that notice was given to Captain W. S. Mayer, Cammanding Officer of the above-mentioned Depot, that unless filings respecting application of water to a beneficial use were made within thirty days, the application would be cancelled; that on the 25th day of July, 1955, the above-mentioned Captain W. S. Mayer notified the State Engineer that the applications for water rights with regard to the wells in question were being dropped "upon instructions of the Commandant of

⁸Complaint for Declaratory Judgment, pars. V, VI (a), (b), (c), (d), pages 8, 9, 10, 11.

⁹Complaint for Declaratory Judgment, par. VII (a), page 11.

the Twelfth Naval District based upon an alleged rule of the United States Supreme Court in the case of *Federal Power Commission vs. The State of Oregon*, 349 U. S. 435.”¹⁰ It is likewise averred that on the 7th day of September, 1955, the State Engineer made, entered and served upon Captain Mayer an order entitled “In The Matter of Permits To Appropriate Water, Serial Numbers 12988 to 12993, Inclusive, In The Name of U. S. of America, U. S. Naval Ammunition Depot, Hawthorne, Nevada,” ordering that by reason of the failure of the applicant to file proofs of beneficial use and the failure to make application for extension of time within which to file the proofs according to law, the permits were cancelled as of the 25th day of August, 1955.¹¹ Thereafter it is averred that “the applicant was granted until thirty days from and after the said 7th day of September, 1955, in which to reinstate said permits, a full, true and correct copy of which said Order marked Exhibit E is hereunto annexed, made a part hereof and referred to as if here fully set forth; that neither the United States Government nor any officer or representative thereof in its behalf have reinstated or endeavored to reinstate said permits, but have failed, neglected and refused so to do, and that any use of said waters is now illegal and contrary to the

¹⁰Complaint for Declaratory Judgment, par. VII (a), page 11.

¹¹Complaint for Declaratory Judgment, par. VII (b), pages 11, 12.

laws of the State of Nevada in such cases made and provided.”¹²

VIII.

Jurisdiction of the Fifth Judicial District Court of the State of Nevada is averred to be predicated upon Section 6, Article VI, of the Constitution of Nevada; similarly it is averred that the court last mentioned is “endowed with the power to declare rights, status and legal relations” pursuant to “Section 1 of ‘An Act providing for declaratory judgments,’ approved March 4, 1929, being Section 9440, Nevada Compiled Laws 1929”; that the United States of America “has consented to be sued in any suit with respect to the rights to the use of water of a river system or other sources, or the administration of such rights, in that certain Act of Congress, approved July 10, 1952, being found in 66 U. S. Statutes 560, Title 2. and also in Title 43, Section 666 * * *.”¹³

IX.

Nevada then “prays judgment declaring its rights, status and legal relations in and to the underground waters situate in the said United States Naval Ammunition Depot:” (1) That the waters “were and are the property of and belong to the State of Nevada”; (2) That the Legislature

¹²Complaint for Declaratory Judgment, par. VII (b), page 12.

¹³Complaint for Declaratory Judgment, par. VIII, 1, 2, 3, 4, pages 12, 13.

of the State of Nevada is the only department endowed with constitutional power to dispose of and relinquish title to the property; (3) That the State of Nevada did not cede exclusive jurisdiction over the underground waters situated in the Naval Depot; (4) "That by reason of the failure, neglect and refusal of the officers and representatives of the United States and its government to file its proofs of application of said underground waters to beneficial use as required by the water laws of the State and the resultant cancellation of its permits to appropriate said waters pursuant to such laws, the use of said waters by the United States and its naval department is an illegal use and contrary to the laws of the State";¹⁴ that "the Court in this declaratory judgment enter such other orders as shall be deemed meet."¹⁵

X.

The United States of America, Defendant, derives all of its powers in connection with the Administration of the United States Naval Ammunition Depot alluded to above from the Constitution of the United States; the action is founded on claims and rights arising under the Constitution, treaties and laws of the United States of America, over which the United States District Court for the District of Nevada has original jurisdiction.

¹⁴Complaint for Declaratory Judgment, pages 13, 14.

¹⁵Complaint for Declaratory Judgment, page 14.

XI.

Service of a copy of the summons and Complaint for Declaratory Judgment in the subject cause was made upon the United States of America pursuant to 43 U. S. C., 666 by the delivery of it to John V. Lindsay, Executive Assistant to the Attorney General of the United States, who is empowered to receive service on behalf of the Attorney General pursuant to 43 U. S. C., 666.

XII.

Copies of all of the summons, pleadings, exhibits, orders and related documents served upon the United States of America are hereto attached.

XIII.

This petition for removal is pursuant to the provisions of 28 U. S. C., 1441, et seq.; 28 U. S. C., 1446, et seq.

Wherefore the United States of America, Defendant, prays that the aforesaid and above-entitled action for declaratory judgment, No. 2885, in the Fifth Judicial District Court of the State of Nevada, in and for the County of Mineral, be removed to the District Court of the United States for the District of Nevada for trial and determination and for such other proceedings as may be necessary so that the ends of justice will be served and that this Honorable Court proceed thereupon as if the cause had been originally commenced herein.

Dated: December 22, 1955.

UNITED STATES OF
AMERICA,

/s/ J. LEE RANKIN,
Assistant Attorney General;

/s/ WILLIAM H. VEEDER,
Attorney, Department of
Justice.

Duly Verified.

[Endorsed]: Filed December 27, 1955.

[Title of District Court and Cause.]

MOTION TO REMAND

Comes Now the plaintiff State of Nevada, and moves the Court to remand this cause to the Fifth Judicial District Court of the State of Nevada, in and for the County of Mineral, from which Court it was attempted to be removed to this Court, upon and for the following reasons and grounds, to wit:

That neither the complaint of plaintiff nor the petition for removal states facts sufficient to constitute any Federal question vesting original or any jurisdiction in the said United States District Court.

/s/ HARVEY DICKERSON,
Attorney General of Nevada;

/s/ W. T. MATHEWS,
Special Asistant Attorney General, Nevada; Attor-
neys for Plaintiff.

[Endorsed]: Filed January 9, 1956.

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT AND MOTION TO DISMISS

Comes now the United States of America, acting by and through J. Lee Rankin, Assistant Attorney General, and William H. Veeder, Attorney, Department of Justice, and respectfully moves this Court:

1. To dismiss this action because the Complaint for Declaratory Judgment filed by the State of Nevada fails to state a claim against the United States of America upon which relief can be granted, but rather that complaint reveals on the face of it that the United States of America is the owner of and has title to the rights to the use of water which are part and parcel of the lands comprising the United States Naval Ammunition Depot near the town of Hawthorne, Mineral County, State of Nevada, the rights in question being exercised for the purpose of National Defense.¹

¹See Affidavit, Exhibit E, respecting title to the lands involved, and Exhibits A, B, C and D, Executive Orders withdrawing the lands for the purpose of establishing the ammunition depot in question.

2. To dismiss this action for the reason that this Honorable Court lacks jurisdiction over the United States of America which has neither consented to be sued nor in any manner waived its immunity from suits of the character here involved under the facts and circumstances alleged in the complaint originally filed in the Fifth Judicial District Court of the State of Nevada, in and for the County of Mineral and removed to this Court.

Wherefore the United States of America, based upon the supporting affidavit and exhibits, together with the accompanying memorandum of points and authorities in support of these motions, does respectfully petition this Honorable Court to enter a judgment of dismissal on the grounds and for the reasons that the complaint fails to state a claim because of the ownership of the properties here involved by the United States of America and that Nevada is without any right, title, interest or control over those properties described in the complaint, or to dismiss this cause by reason of the lack of this Court's jurisdiction over the United States of America or its properties.

Dated: December 30, 1955.

UNITED STATES OF
AMERICA,

/s/ J. LEE RANKIN,

Assistant Attorney General;

/s/ WILLIAM H. VEEDER,
Attorney, Department of
Justice.

[Endorsed]: Filed January 3, 1956.

[Title of District Court and Cause.]

ORDER DENYING MOTION TO REMAND

The motion of the plaintiff to remand the above-entitled matter back to the Fifth Judicial District Court of the State of Nevada, in and for the County of Mineral, came on this day to be heard, the Attorney General of the State of Nevada being represented by W. T. Mathews and William J. Kane, Special Assistant Attorney General, and William D. Dunseath, Deputy Attorney General, the United States being represented by Stanley H. Brown, Assistant United States Attorney, and David R. Warner, Attorney Department of Justice; and the motion being argued and submitted to the Court for ruling, and being fully considered by the Court; now, therefore, and good cause appearing, it is

Ordered, that the plaintiff's motion to remand be and the same is hereby denied.

Dated at Carson City, Nevada, this 24th day of May, 1956.

/s/ JOHN R. ROSS,
United States District Judge.

[Endorsed]: Filed June 5, 1956.

[Title of District Court and Cause.]

ORDER DENYING MOTION TO DISMISS
ACTION AND FOR SUMMARY JUDG-
MENT

The motions of the United States, defendant above, to dismiss the action filed by the State of Nevada, and for a summary judgment, came on this day for hearing, W. T. Mathews and William J. Kane, Special Assistant Attorneys General, appearing for the State of Nevada, the United States being represented by Stanley H. Brown, Assistant United States Attorney, and David R. Warner, Attorney Department of Justice; and each of said motions being argued and submitted to the Court for ruling, and being fully considered by the Court; now, therefore, and good cause appearing, it is

Ordered, that defendant's motion to dismiss the action be and the same is hereby denied; and it is

Further Ordered, that defendant's motion for a summary judgment be and the same is hereby denied; and it is

Further Ordered, that the defendant shall have thirty (30) days in which to answer.

Dated at Carson City, Nevada, this 25th day of May, 1956.

/s/ JOHN R. ROSS,

United States District Judge.

[Endorsed]: Filed June 5, 1956.

[Endorsed]: No. 16389. United States Court of Appeals for the Ninth Circuit. The State of Nevada, Ex Rel Hugh A. Shamberger, State Engineer, Appellant, vs. United States of America, Appellee. Supplemental Transcript of Record. Appeal from the United States District Court for the District of Nevada.

Filed and Docketed: March 3, 1959.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

No. 16389

United States Court of Appeals

FOR THE

Ninth Circuit

THE STATE OF NEVADA, EX REL. HUGH A.
SHAMBERGER, STATE ENGINEER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE.

APPELLANT'S OPENING BRIEF

ROGER D. FOLEY,
Attorney General
Carson City, Nevada

W. T. MATHEWS
Special Assistant Attorney General
331 Gazette Building
Reno, Nevada

WILLIAM N. DUNSEATH,
Special Assistant Attorney General
Clay Peters Building
Reno, Nevada
Counsel for Appellant.

July 31, 1959.

FILED

AUG 10 1959



No. 16389

United States Court of Appeals

FOR THE
Ninth Circuit

THE STATE OF NEVADA, EX REL. HUGH A.
SHAMBERGER, STATE ENGINEER, APPELLANT

v.

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331 Gazette Building
Reno, Nevada

WILLIAM N. DUNSEATH,
Special Assistant Attorney General
Clay Peters Building
Reno, Nevada
Counsel for Appellant.

July 31, 1959.

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No. 16389

United States Court of Appeals

FOR THE

Ninth Circuit

THE STATE OF NEVADA, EX REL. HUGH A.
SHAMBERGER, STATE ENGINEER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE.

APPELLANT'S OPENING BRIEF

STATEMENT

COMES NOW the State of Nevada, Appellant herein, and submits its Opening Brief in a case wherein the matters of fact and of law drawn in issue relate to the ownership, control and administration of the rights to the beneficial consumptive use of water by and between two sovereign entities, the United States of America and a sovereign State of that Union. The issues relate to a subject most vital to the arid regions of the United States, particularly to some seventeen Western States and of great importance to the State of Nevada.

NOTE: The Transcript of the Record on Appeal will be abbreviated and cited herein as R- followed by the page number thereof.

JURISDICTION OF THE COURT

The instant suit was commenced by the State of Nevada on November 30, 1955, by the filing of its complaint in the Fifth Judicial District Court of the State of Nevada, in and for the County of Mineral, wherein the United States was joined as defendant. The purpose of the suit so commenced was to secure a declaratory judgment judicially determining the State's rights, status and legal relations under its laws pertaining to the appropriation to beneficial use of the underground waters of the State by the United States and its government in and upon the United States Naval Ammunition Depot. R-3-19, Complaint for Declaratory Judgment.

The basis of the State Court's jurisdiction to render declaratory judgments was and is Section 1 of "An Act providing for declaratory judgments," approved March 4, 1929, being Section 9440, Nevada Compiled Laws 1929. R-17.

The United States was joined as defendant in the suit pursuant to and by the authority of that certain Act of Congress, approved July 10, 1952, denominated herein "Consent to Suit Act," being found at 66 U. S. Statutes 560, Title 2, and also in Title 43, Section 666, F.C.A., reading:

(a) Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders,

and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: Provided, That no judgment for costs shall be entered against the United States in any such suit.

(b) Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

R-17.

Service of Summons and Complaint in the suit was duly admitted by the Attorney General of the United States on December 7, 1955.

Thereafter and on or about December 23, 1955, the defendant United States filed in the District Court of the United States for the District of Nevada its Petition for Removal of the cause from the State Court to the said District Court, which petition was opposed by the plaintiff State in its counter motion to remand filed January 9, 1956. The Petition to Remove was granted May 24, 1956.

After the removal of the suit to the Federal Court and on June 25, 1956, the defendant filed therein its Answer to the State's Complaint so removed from the State Court. R-33-39. Whereupon the issues were drawn for the judicial declaration of the rights of two sovereign entities to the control and disposition of the underground waters in the United States Naval Ammunition Depot.

The removal of the suit from the State Court to the Federal Court did not alter the purport thereof, i.e., the judicial declaration of the State's rights, status and legal relations in and to the underground waters in question. Such right to a declaratory judgment still remains, being sanctioned by the Federal Declaratory Judgments Act, Title 28, Section 2201, F.C.A., reading:

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

The facts and circumstances of the case at bar discloses beyond any doubt that an actual justiciable controversy existed and exists between the parties herein thus bringing the matter within the Declaratory Judgments Act. It is also to be noted that Rule 57 of the Federal Rules Civil Procedure governing declaratory judgments provides, *inter alia*, "The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate."

STATEMENT OF THE BASIC FACTS

The issues drawn and submitted in the case at bar present a most important matter, especially to the States of the arid West, i.e., which sovereign entity, the United States or a State of the Union is vested with the control for appropriation to beneficial consumptive use by the United States the non-navigable waters, including underground waters, within the boundaries of such State, particularly in view of the enactment by the Congress of the United States the hereinabove quoted Consent to Suit Act in 1952. R-17.

The facts upon which the issues herein are premised are fully set forth in the Record on Appeal, i. e., the Complaint for Declaratory Judgment and Exhibits, R-3-32, Answer and Exhibits, R-33-44, Stipulation of Facts, R-44-56.

The facts briefly summarized disclose:

1. That the land embraced within the area, 200,000 acres, comprising the United States Ammunition Depot was and is a portion of the land ceded to the United States by Mexico under the Treaty of Guadalupe Hidalgo in 1848. R-45.

2. That the Depot lands were included within the Territory of Nevada upon its admission to the Union in 1864 upon "an equal footing with the original States," and were thereafter held by the United States as a proprietor of public domain. R-46.

3. That the Nevada Enabling Act, 32 Stat. 30, enacted by Congress contained a provision whereby the people of the Nevada Territory, upon its admission to the Union, "do agree and declare that they forever disclaim all right and title to the unappropriated public lands within said territory lying within said territory, and that the same shall be and remain at the sole and entire disposition of the United States." R-47.

NOTE: That such disclaimer with respect to the public lands carried with it a disclaimer as to the waters thereon and therein was most definitely disposed of to the contrary in *California-Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 143.

4. That beginning in 1926, and divers times thereafter to 1935, by Executive Orders, the lands comprising the Depot were withdrawn from entry for the purpose of establishing the Depot. R-46.

5. That in 1935 the Legislature ceded jurisdiction over the lands comprising the Depot. R-60.

NOTE: Nevada alleges, however, that said cession of jurisdiction was over the land only, "but not over the corpus of the water nor the application of its laws providing for the beneficial use thereof." R-4.

6. That in 1939 the Legislature of Nevada enacted a comprehensive Underground Water Act and provided therein for the

appropriation thereof to beneficial use in the manner and form as provided in the General Water Law of 1913, and therein included "United States governmental agency" and the United States as a "person" required to make application to appropriate such waters. R-5-11.

7. That from and after the 15th day of February, 1942, to and including the 15th day of September, 1945, the United States, by and through its officers, caused to be drilled within the Depot some six wells tapping the underground waters therein. Said wells were known as U. S. Navy Wells, Nos. 1, 2, 3, 4, 5 and 6, and the waters thereof were developed for the use of the United States. R-11, 52.

NOTE: Navy Wells Nos. 2, 3, 4, 5 and 6, occupy the same status as Navy Well No. 1. The issues herein and the decision thereon will relate to those wells to the same extent as to Well No. 1. R-99.

8. That subsequent to the completion of the drilling of said wells and on or about the 29th day of July, 1949, Captain J. S. Crenshaw, for and in behalf of the United States Government, filed in the office of the State Engineer of the State of Nevada an application for permit to appropriate the water, to beneficial use, of each of the Navy Wells Nos. 1, 2, 3, 4, 5 and 6. The said applications were approved by the State Engineer. That thereafter all the provisions of the water laws of the State pertaining to the appropriation of said waters were strictly followed by Captain Crenshaw, and other like officers of the United States, in the perfecting of the rights to the beneficial use of said waters, even to the extent that all that remained to be done was the filing with the State Engineer a simple document, required by law, showing that the waters of the wells had been placed to beneficial use. In fact, the waters had been in beneficial use ever since the

drilling of the wells. Upon the filing of this latter document the Certificate of Water Right would have been issued forthwith by the State Engineer. R-12-15, 20-28, 52-54.

9. That three extensions of time, as provided in the water law for the filing of proof of beneficial use of the waters in question, were sought by the United States and granted by the State Engineer. R-13-15, 28-32. The last extension of time so granted expired July 27, 1955. Prior to such expiration date the State Engineer, in writing, advised Captain W. S. Mayer, Jr., then Commandant of the Depot, of such expiration date and the necessity of either filing proof of beneficial use or the making application for further extension of time within which to so file. Captain Mayer thereupon replied in writing to the effect that upon instructions from the Commandant, Twelfth Naval District, the applications for water rights of said wells were being dropped upon the authority of the ruling of the Supreme Court in the case of *Federal Power Commission v. State of Oregon*, 349 U.S. 435. R-28-32. (Exhibit "E," annexed to plaintiff's complaint, being the State Engineer's Order issued upon refusal of the defendant to reinstate its applications to appropriate the waters in question.) R-28-32.

10. The town of Hawthorne, County Seat of Mineral County, is situated in and entirely surrounded by the Naval Depot area. Map annexed to Stipulation of Facts. R-40, 99. It was also agreed by counsel for the United States upon the trial that two wells had been drilled by and in the town of Hawthorne tapping the underground water, one well senior in time and one junior in time to the six Navy wells, the waters of which were appropriated according to law, and that the Naval Department had caused the drilling of two additional wells in the area, prior to the trial, for which no applications for permits to appropriate were made.

**THE BASIC LAW UPON WHICH NEVADA HEREIN
PREMISES ITS PLENARY CONTROL OF
THE UNDERGROUND WATERS**

Historically and judicially the right to appropriate to beneficial consumptive use the waters in the arid States of the West was developed over a period of many years, pursuant to two doctrines, i.e., the California and the Colorado doctrines. The history of the development of the doctrines and the inception and application thereof is well documented in 1 Wiel, *Water Rights, Western States*, 3d Ed., Chapters 5, 6, 7, 8, Sections 66–187.

Briefly the basic difference between the doctrines was and is that the appropriator of the beneficial use of the water in California deraigned his title to such use from the United States as owner and proprietor of the public lands, based upon the common law rule of the ownership of the waters by the sovereign, the United States, as allegedly drawn from the Common Law of England.

The Colorado doctrine rejected and rejects such proposition of law and theory. The Colorado doctrine rests upon the foundation that the waters within its boundaries belong to the State as a sovereign or its people, the terms being used synonymously, and subject to appropriation to beneficial use pursuant to its laws, recognizing only the navigation servitude right of the United States.

It is common knowledge that the law of appropriation to beneficial use of water in this country under the rule of "first in time first in right" had its inception in 1848 shortly after the discovery of gold in California. That the primary use of such water was a necessity in the mining of gold. That the miners themselves adopted customs, rules and regulations which to all intents and purposes have been and are now part and parcel of the water laws of the Western States. 1 Wiel, *supra*, Sec. 73.

The Supreme Court, in *Jennison v. Kirk*, 98 U.S. 240, (8 Otto 453), decided in 1879, most favorably commented upon the events and the customs and rules of the miners leading up to the establishment of the appropriation doctrine in California and also Nevada in construing Section 9 of the pertinent act of 1866, hereinafter cited. The Court made it clear that the doctrine of appropriation of water to beneficial use was part and parcel of the mining of minerals. The Court in the course of its opinion paid tribute to then Senator Stewart of Nevada, the author of the act of 1866.

The act of 1866, 14 Stats. 85, provided in Section 5, "In all cases lands valuable for minerals shall be reserved from sale, except as otherwise provided by law." This section is now Section 21, Title 30, F.C.A. The act of 1866 was the first act of Congress dealing with the United States' property in minerals and referring to use of water in connection therewith. Such act was the result of the intent of Congress in the first instance to secure funds for payment of the Civil War debt. 1 Wiel, *supra*, Sections 86, 92, 93, 94. However, the act in fact accomplished far more than the securing of revenue from mining, as stated by Wiel in Section 99:

The act of 1866 gave the formal sanction of the United States to the prevailing theory of a grant to the holders of existing rights upon public lands, which indeed was its primary object; for the statute had in view chiefly appropriations already made rather than future ones, and the protection of existing rights on the public lands against the United States itself (by the act of 1866) and against its later riparian patentees (by the enactment of 1870) was the primary object. Those rights had been built up in reliance upon the tacit acquiescence of the United States, the true owner of the lands and (*under the assumption of those days*) waters on which appropriations were made, and these

statutes acquiesced therein expressly, "a voluntary recognition of pre-existing rights rather than the establishment of a new one." (*Italics supplied.*)

In making the foregoing statement, of course, Wiel had no knowledge that the United States Supreme Court would in *California-Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935), in construing the Desert Land Act of 1877 broaden his conclusion as to pre-existing rights and extend to the States the right to determine for themselves the future policy with respect to the appropriation of the use of water.

In the course of its opinion the Court said, at pages 162-164:

As the owner of the public domain, the government possessed the power to dispose of land and water thereon together, or to dispose of them separately. *Howell v. Johnson*, 89 Fed. 556, 558. The fair construction of the provision now under review is that Congress intended to establish the rule that for the future the land should be patented separately; and that all non-navigable waters thereon should be reserved for the use of the public under the laws of the states and territories named. The words that the water of all sources of water supply upon the public lands and not navigable "shall remain and be held free for the appropriation and use of the public" are not susceptible of any other construction.

The only exception made is that in favor of existing rights; and the only rule spoken of is that of appropriation. It is hard to see how a more definite intention to sever the land and water could be evinced. The terms of the statute, thus construed, must be read into every patent thereafter issued, with the same force as though expressly incorporated therein, with the result that the grantee will take the legal title to the land conveyed, and such title, and only such title, to the flowing waters thereon as shall be fixed or acknowledged by the customs, laws, and judicial decisions

of the state of their location. If it be conceded that in the absence of federal legislation the state would be powerless to affect the riparian rights of the United States of its grantees, still, the authority of Congress to vest such power in the state, and that it has done so by the legislation to which we have referred, cannot be doubted.

* * * * *

Second. Nothing we have said is meant to suggest that the act, as we construe it, has the effect of curtailing the power of the states affected to legislate in respect of waters and water rights as they deem wise in the public interest. What we hold is that following the act of 1877, if not before, all non-navigable waters then a part of the public domain became *publici juris*, subject to the plenary control of the designated states, including those since created out of the territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common law rule in respect of riparian rights should contain. For since "Congress cannot enforce either rule upon any state," *Kansas v. Colorado*, 206 U.S. 46, 94, the full power of choice must remain with the state. The Desert Land Act does not bind or purport to bind the states to any policy. It simply recognizes and gives sanction, insofar as the United States and its future grantees are concerned, to the state and local doctrine of appropriation, and seeks to remove what otherwise might be an impediment to its full and successful operation.

The California-Beaver case was followed with approval in *Ickes v. Fox*, 300 U.S. 82.

It is submitted that historically, if not in fact judicially, the Western law of the right to appropriate water to beneficial consumptive use was initially determined by the rules of the miners and thereafter by the law of the State wherein such right was acquired or sought.

Such is not the status of the law with respect to the ownership, control and the administration of the rights to minerals found upon the public domain. Congress in 1872 enacted a new mining act, found at 17 Stats. 91. This act as stated by the Court in *Reynolds v. Iron Silver Mining Co.*, 116 U.S. 687, became the foundation of the existing mining laws, which said laws are now found in Title 30, Sections 2154, F.C.A. Section 9 of the 1866 act is incorporated in the mining act of 1872, now being Section 51 of Title 30, F.C.A. Said Section 9 provides:

Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessions and owners of such vested rights shall be maintained and protected in the same; and the right-of-way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage. R. S. Sec. 2339.

The Court in *McFarland v. Alaska Perserverance Min. Co.*, 3 Alaska 308, held that:

This section (Sec. 9) is not only found in the body of the mining acts passed by Congress and classified therewith by statute, as well as by courts and law writers, but next to the right to mine on the public domain it grants to the miners the most valuable incident thereto, the right to use the public waters in mining, which is the very essence of the mineral laws, without which mining could not be made profitable.

The Supreme Court in the *California-Oregon v. Beaver Portland* case well said at pages 155-156 of 295 U. S.:

The effect of these acts is not limited to rights acquired before 1866. They reach into the future as well, and approve and confirm the policy of appropriation for a beneficial use, as recognized by local rules and customs, and the legislation and judicial decisions of the arid-land states, as the test and measure of private rights in and to the non-navigable waters on the public domain. *Jones v. Adams*, 19 Nev. 78, 86; 6 Pac. 442; *Jacob v. Lorenz*, 98 Cal. 332, 335-336; 33 Pac. 119.

If the acts of 1866 and 1870 did not constitute an entire abandonment of the common-law rule of running waters insofar as the public lands and subsequent grantees thereof were concerned, they foreshadowed the more positive declarations of the Desert Land Act of 1877, which it is contended did bring about that result. That act allows the entry and reclamation of desert lands within the states of California, Oregon, and Nevada (to which Colorado was later added), and the then territories of Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico, and Dakota, with a proviso to the effect that the right to the use of waters by the claimant shall depend upon bona fide prior appropriation, not to exceed the amount of waters actually appropriated and necessarily used for the purpose of irrigation and reclamation. Then follows the clause of the proviso with which we are here concerned:

“* * * all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights.” Ch. 107, 19 Stat. 377.

The right to mine the minerals and the right to the use of water for beneficial purposes most certainly grew out of the customs and rules of the early day miners in the West. As stated by the

Court in the California-Oregon v. Beaver Portland case at page 154:

The rule generally recognized throughout the states and territories of the arid region was that the acquisition of water by prior appropriation for a beneficial use was entitled to protection; and the rule applied whether the water was diverted for manufacturing, irrigation, or mining purposes. The rule was evidenced not alone by legislation and judicial decision, but by local and customary law and usage as well. *Basey v. Gallagher*, 20 Wall. 670, 22 L.Ed. 452; *Atchison v. Peterson*, 20 Wall. 507, 22 L.Ed. 414.

This general policy was approved by the *silent acquiescence of the Federal Government*, until it received formal confirmation at the hands of Congress by the Act of 1866. (Italics supplied.)

Congress, in 1872, pursuant to Article IV, Section 3, of the Federal Constitution, enacted a new comprehensive mining act governing the control of and providing for the acquisition of valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed. Section 1 of that act provided, inter alia, that such mineral deposits "are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States." Sec. 1, 17 Stats. 91. Title 30, Sec. 22, F.C.A.

Then follows the respective sections of the act expressly setting forth the statutory regulations with respect to the procedure to be followed in acquiring mining property from the United States.

Such act does provide for supplementary legislation not inconsistent therewith by the States and recognizing the local customs and rules of miners.

This act of Congress was closely examined by the Supreme Court in *Butte City Water Co. v. Baker*, 196 U.S. 119, 49 L.Ed. 409 (1905) wherein the Court held that supplementary regulations concerning the location of mining claims, prescribed by a State in addition to the Congressional regulations, are not invalid on the theory that they were enacted in the exercise of unlawful delegation by Congress of legislative power.

The point is that the United States as far back as 1866 expressly by acts of Congress claimed and established ownership of the valuable minerals upon and in the public lands. That Congress provided by law enacted pursuant to the Property Clause of the Constitution the rules and regulations for the disposal of the property of the United States, granting therein permissive rights to the States and the customs and rules of the miners.

But as to the water and the right to the beneficial use of water, even though such right of use was and is part and parcel of the mining of minerals and had its inception as a branch of the Western mining law, Congress to this day after more than ninety years in acquiescing in the application of the customs, rules and regulations of the miners and the laws of the States thereon, has enacted no law claiming and establishing the ownership over and the promulgation of rules and regulations for the disposal and/or the regulation of water and the right to the beneficial use thereof by any person, entity or State pursuant to the Property Clause of the Constitution or otherwise.

It is conceded that as to the navigable waters of the United States Congress has pursuant to the Commerce Clause of the Constitution legislated as to the use thereof. On the other hand,

it is significant that if in fact the United States owns the non-navigable waters in and upon public lands, Congress has not legislated in the same manner or at all as it legislated for and concerning the minerals and the right to acquire them. In brief, the silence of Congress in this respect is most persuasive evidence it intended that the question of the right to appropriate the waters on and in the public lands to beneficial consumptive use is to be answered and controlled by the laws of the State wherein such right is sought.

CONCLUSION

It cannot well be denied that "the relation of the United States Government to the appropriation doctrine has involved essentially a recognition of State customs and laws upon the subject, as applied to non-navigable waters on the public domain.

The following cases certainly support the foregoing analysis of the inception of the Western law of the appropriation to beneficial consumptive use of the non-navigable waters, including underground waters, based upon the rules and regulation established by the miners, ripening into State control under its laws of the waters within its boundaries, sanctioned and acquiesced in by the Congress over a period of many years.

Atchison v. Peterson, 20 Wall. 507, 22 L.Ed. 414; *Basey v. Gallagher*, 20 Wall. 670, 22 L.Ed. 452; *Broder v. Natonia Water and Mining Co.*, 101 U.S. 274; *United States v. Rio Grande Dam & Irrig. Co.*, 174 U.S. 770; *Gusterres v. Albuquerque Land & Irrig. Co.*, 188 U.S. 545; *Kansas v. Colorado*, 206 U.S. 46; *Brush v. Commissioner*, 300 U.S. 352.

In addition to the foregoing cases, it is submitted that the Congress over a period of years has enacted many statutes relating

to the beneficial use of the waters wherein the laws of the State governing the appropriation thereof were not only sanctioned but invoked. Citations thereof are included in the Appendix to this brief.

THE WESTERN STATES ADHERE TO THE COLORADO DOCTRINE OF STATE OWNERSHIP AND CONTROL OF NON-NAVIGABLE WATERS

The following States adopted the State or public ownership of water doctrine: Arizona, Section 3280, Rev. Code 1928; Colorado, Constitution, Art. XVI, Sec. 5; Idaho Code, Sec. 42-101; Nebraska, Comp. Stats. 1929, Sec. 1; Nevada, 1903 Stats. Chap. IV, Sec. 1, N.C.L. 1929, Sec. 7890, NRS 533.-025; New Mexico, Constitution, Art. XVI, Sec. 2, 1929, Code Sec. 1510101; North Dakota, 1913 Laws, 8235, as amended 1939 Laws, Ch. 255; Oregon, 1935 Code, Sec. 47-401; South Dakota, 1939 Code, Sec. 61.0101; Texas, Rev. Stats. 1936, Sec. 7467; Utah, Rev. Stats. 1933, Sec. 100-1-1; Washington, Remington Rev. Stat. 7351; and Wyoming, Constitution, Art. I, Sec. 31, Art. VIII, Sec. 1.

Thus fourteen arid Western States, except California in part, have rejected the common law theory of riparian rights and have assumed the plenary ownership and control of all waters within their boundaries, save only as to the navigation servitude of the United States on navigable waters. Long ago the Supreme Court of Nevada rejected, as most unsuitable to its arid condition, the common law riparian doctrine. *Jones v. Adams*, 19 Nev. 78; *Reno Smelting Mill and Reduction Works v. Stevenson*, 20 Nev. 269. And *In Re Waters of Manse Spring*, 60 Nev. 280, declared "that all water within the State, whether above or beneath the ground, belongs to the State."

The recognition of the power of the State to determine which of the conflicting doctrines should prevail was determined in *Kansas v. Colorado*, 206 U. S. at page 94, holding, "It may determine for itself whether the common law rule in respect to riparian rights or the doctrine which obtains in the arid regions of the West of the appropriation of waters for the purpose of irrigation shall control, Congress cannot enforce either rule upon any state." It is also to be noted that Section 102 of the California Water Code of 1943 provides "All water within the State is the property of the State."

THE SOVEREIGNTY OF THE STATE OF NEVADA

The Proclamation of President Abraham Lincoln admitting Nevada into the Union provides:

Now, therefore, be it known, that I, Abraham Lincoln, President of the United States, in accordance with the duty imposed upon me by the Act of Congress aforesaid, do hereby declare and proclaim that the said State of Nevada is admitted into the Union on an equal footing with the *original states*. (Italics supplied.)

Proclamation—Marsh—Nevada Constitutional Debates.

Equality of constitutional right and power is the condition of all the States of the Union, old and new.

Escanaba and L. M. Transp. Co. v. Chicago, 107 U.S. 678; *Pollard v. Hagan*, 3 How. 212; *United States v. Texas*, 143 U.S. 621.

In *Coyle v. Smith*, 221 U.S. 559, the Court said, at page 567:

The power is to admit new States into this Union. This Union was and is a Union of States, equal in power, dignity and authority, each competent to exert that residuum of

sovereignty not delegated to the United States by the Constitution itself. To maintain otherwise would be to say that the Union, through the power of Congress to admit new States, might come to be a Union of States unequal in powers, including States whose powers were restricted only by the Constitution, with others whose powers had been further restricted by an Act of Congress accepted as a condition of admission.

Nevada rejected the riparian doctrine in 1885, in *Jones v. Adams*, 19 Nev. 78, followed in *Reno Smelting Mill and Reduction Works v. Stevenson*, 20 Nev. 269. In 1903 Nevada by statute provided that "All natural water courses and natural lakes, and the waters thereof * * * belong to the public." Chap. IV, Sec. 1, Stats. 1903. The Legislature in 1907 re-enacted Section 1 of the 1903 act. Chap. XVIII, Stats. 1907.

Prior to the withdrawal from entry of the public lands now within the boundaries of the Naval Depot in 1926, Nevada adopted the Water Law of 1913, Section 1 of which provides:

The water of all sources of water supply within the boundaries of the State, whether above or beneath the surface of the ground, belongs to the public. (Italics supplied.)

Thus Nevada served notice that the unappropriated water of all sources of supply within the boundaries of the State belonged to the public, i.e., the State. The Supreme Court of Nevada in the case of *In Re Waters of Manse Spring*, 60 Nev. 280, at page 286, well said:

We find ourselves in agreement with the argument of appellant that the legislature has declared all water within this state, whether above or beneath the surface of the ground, to belong to the state; that the use of water is authorized by law; and this court has, since the overruling

of the riparian doctrine in the case of *Jones v. Adams*, 19 Nev. 78, 6 P. 442, 3 Am.St.Rep. 788, held that there is no ownership in the corpus of the water, but that the use thereof may be acquired, and the basis of such acquisition is beneficial use.

The interpretation given by the highest Court of the State to the various statutes of the State regulating water rights is binding upon the Federal Courts.

Oklahoma Gas and Elec. Co. v. Wilson and Co. (CCA 10) 54 F.2d 596; *Holbrook Irrigation Dist. v. Arkansas Valley Sugar Beet and Irrigated Land Co.* (CCA 10), 54 F.2d 840.

There can be no denial that Nevada has since 1885, if not before, adopted and sanctions the Colorado doctrine and applied such doctrine to underground water.

In 1939 the Nevada Legislature by law brought the underground water of the State within the purview of the 1913 general water law. Plaintiff's complaint, paragraph III. R-5. Such law was enacted prior to the drilling of the wells by the Navy Department on and in the Naval Depot. Plaintiff's complaint, paragraph V, R-11, and Exhibits annexed to complaint. R-20-32.

The Nevada Water Law of 1913 and the Underground Water Act of 1939 accorded the United States and the State the same right to appropriate water to beneficial consumptive use as an individual. Paragraph III, plaintiff's complaint. R-5. However, such laws require them to make application to appropriate the waters to beneficial consumptive use in the same manner as is required of an individual. The Legislature of Nevada applied the same requirement to the State and the United States that Congress provided should be applied to the United States pursuant to the language of the Consent to Suit Act, i.e., that the "United States * * * shall be subject to the judgments,

orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances * * *."

CONGRESS IN THE ENACTMENT OF THE CONSENT TO SUIT ACT OF 1952, TITLE 43, SECTION 666 F.C.A. SO LEGISLATED AS TO BRING THE UNITED STATES WITHIN THE PURVIEW OF STATE LAWS RELATING TO THE APPROPRIATION OF THE WATERS OF ANY SOURCE TO BENEFICIAL CONSUMPTIVE USE.

The source of the water, the right to the use of which is the issue in the instant case, is underground water. The Consent to Suit Act uses the term "river system or other source." Section 1 of the Desert Land Act of 1877 (Title 43, Sec. 321, F.C.A.) provides, *inter alia*, "and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and *other sources* of water supply upon the public lands and not navigable shall remain and be held free for appropriation and use of the public * * *." (*Italics supplied.*)

The Supreme Court of New Mexico in a well-reasoned opinion concerning the application of the New Mexico statute relating to appropriation of underground water, had occasion to interpret the above-quoted language of the Desert Land Act as applicable to the State act. The Court said:

The question here is as to the intention of Congress in using the following language "together with the water of all lakes, rivers, and other sources of water supply." Does this include water dedicated to public use by act of 1931? It was the intention of Congress in using the words "other sources of water supply" to cover all water that could be

used and appropriated for beneficial use under the laws of the State where the land is located.

State ex rel. Bliss v. Dority et al., (1950) 225 Pac.2d 1007, at page 1014.

The Consent to Suit Act received exhaustive examination and interpretation by District Judge Hall in Rank v. (Krug) United States, 142 Fed.Supp. 1-186. Such examination and interpretation fills many pages of the Report beginning on page 69, title "Jurisdiction of the United States." A brief summary of the interpretation as applied to the case at bar demonstrates that:

1. It is a suit concerning a justiciable controversy for a declaratory judgment cognizable by the Federal Declaratory Judgments Act as being within the meaning of the word "suit," pages 71, 86.

2. The United States was properly joined as defendant as the owner of or is in the process of acquiring water rights under State law. Page 75 et seq.

3. The act provides adjudication of rights to the use of waters of a river system "or other source." Page 75.

4. The act, waiving sovereign immunity, is not to be given a narrow, restricted, and technical interpretation that will defeat the purposes thereof, i.e., "where broad statutory language is used in a waiver of immunity statute, such as used in Section 666, it is not to be thwarted by unduly restrictive interpretation." Citing Canadian Aviator v. United States, 1945, 324 U.S. 215; United States v. Aetna Casualty & Surety Co., 1949, 338 U.S. 366, also cases in Note 31. Page 80.

5. The purpose of the act on its face was to provide a remedy and a procedure where previously congressionally recognized vested rights could be litigated as against the sovereign and result in a judgment which would be res judicata upon the United States. Page 81, cases cited Note 32. In stating the purpose of

the act, the Court there quoted extensively from the Senate Committee Report No. 755 of Senate Bill 18 (now the Consent to Suit Act) wherein the Committee most definitely reviewed the Western water appropriation law and the prime necessity of providing a remedy to enforce against the United States existing substantive rights. A copy of Report No. 755 is included in the Record on Appeal herein.

The Consent to Suit Act, enacted by Congress, approved by the President, unquestionably is a supreme law of the land. Art. VI, Cls. 2, Constitution. That it was enacted to sanction, invoke and preserve, the water laws of the arid Western States cannot well be denied. To the contrary its purpose so to do is expressly stated in Report No. 755. There the Committee found and stated, "In the arid Western States, for more than 80 years, the law has been that the water above and beneath the surface of the ground belongs to the public, and the right to the use thereof is to be acquired from the State in which it is found, which State is vested with the primary control thereof." Page 2. The Committee then considered and quoted with approval from *California-Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, and *Ickes v. Fox*, 300 U.S. 82, concluding therefrom that "It is therefore settled that in the Western States the law of appropriation is the law governing the right to acquire use, administer and protect the public waters as provided in each such State." Page 2.

The Committee then considered the matter as it affected the United States, saying at page 6, "Since it is clear that the states have the control of the waters within their boundaries, it is essential that each and every owner along a given water course, *including the United States*, must be amenable to the law of the State, if there is to be a proper administration of the water law as it has developed over the years." (Italics supplied.)

"The Committee is of the opinion that there is no valid reason why the United States should not be required to join in a proceedings when it is a necessary party and to be required to abide by the decisions of the Court in the same manner as if it were a private individual." Page 6.

It is respectfully submitted that for many years it has been the contention of some of the departments of the Federal Government that the United States owned and controlled the unappropriated waters of the Western States. In *Kansas v. Colorado*, 206 U.S. 46, 1907, the Attorney General of the United States sought the intervention of the United States upon the ground that the United States possessed exclusive legislative power over the waters of the Arkansas River. The Court denied the right to so intervene upon the constitutional ground that the United States had no such power.

Again, in *Nebraska v. Wyoming*, 325 U.S. 589 (1945), Federal ownership of the unappropriated waters was asserted. The Court, however, did not expressly, or at all, decide the issue. It simply said, "Though we assume *arguendo* the United States did own all the unappropriated water, the appropriations under state law were made to individual land owners pursuant to the procedure which Congress provided in the Reclamation Act." Page 615. That the Court only assumed *arguendo* is distinctly pointed out by Justice Douglas in his dissenting opinion in *Federal Power Commission v. Oregon*, 349 U.S. 435. It is submitted that the Supreme Court has not yet declared ownership of any such waters in the United States.

It is further submitted that Congress, in and by the enactment of the Consent to Suit Act in 1952, not only has waived the immunity of the United States as a sovereign to be made a defendant in a suit to determine its rights to the beneficial use of the

waters of a State of the Union above or beneath the surface of the ground, but has also expressly provided that the United States shall be deemed to have waived any right that the State laws relating to the appropriation of said waters are inapplicable and/or that the United States is not amenable thereto. In brief, Congress has most definitely approved and reaffirmed the doctrine of the applicability of State laws governing the right to appropriate to beneficial use the waters of the State as developed and laid down in the *California-Oregon v. Beaver Portland* case, and in so doing made the United States amenable to such doctrine.

And, further, Congress is vested with full legislative power over the property of the United States, including the public domain, and empowered to make all needful rules and regulations concerning it. Art. IV, Sec. 3, Cls. 2, Constitution. And such legislative power is without limitation. *Alabama v. Texas*, 347 U.S. 272.

As pointed out hereinbefore, even if it was or is the fact that the United States owned the non-navigable waters in and upon the public domain, Congress for ninety years and more not only acquiesced in the application of the rules of the miners and the subsequent State laws governing the appropriation to beneficial use such waters, but also, during all of that time, enacted and promulgated no rule or regulation respecting the securing of a right to the use thereof by any person, State or entity. In brief, Congress was content that the laws of the State in this respect provided speedy and more equitable apportionment to beneficial use of the life-giving waters of the arid West, and in 1952 made a rule and regulation that the United States, when the owner of or in the process of acquiring a water right by appropriation under State law, shall be amenable to that law.

In the instant case there is no denial that the United States was in the process of acquiring a water right by appropriation under State law.

The evidence is conclusive that the United States, by and through its officers, had complied strictly with the Nevada water law governing the appropriation of underground water and had put the water to beneficial consumptive use with the entire approval of the State Engineer, the State administrative officer. All that remained to be done to perfect the title to the water right was the filing with the State Engineer a document specifying that such water had been put to beneficial use, upon receipt of which the State Engineer would have caused the recording of such document in the Office of the County Recorder, thus giving public notice of the perfecting of such water right. R-11-16, 31-32.

Upon notice given by the State Engineer, after three extensions of time within which to file the proof of putting the water to beneficial use had theretofore been granted, that such documentary proof must be filed or further extension of time therefor be requested, the permits to appropriate the waters would be cancelled, Captain Mayer, Jr., Commandant of the Naval Depot, replied that the applications for water rights of the Navy wells were being dropped upon instructions from the Commandant of the Twelfth Naval District based on a recent ruling of the Supreme Court in *Federal Power Commission v. Oregon*, 399 U.S. 435. R-29-31.

It is clear that the only ground for the refusal of the officers of the United States to perfect the appropriative right to the waters in question was and is the decision of the Court in *Federal Power Commission v. Oregon*, known as the Pelton Dam Case.

THE PELTON DAM CASE

The Court below in the case at bar discussed the foregoing entitled case and then said, "At worst, the Pelton Dam case is highly persuasive authority in the instant case. At best, it is determinative. This Court is inclined to the latter view." R-76.

The question is, is the said case determinative of the issues in the case at bar. The Appellant asserts that it is not for the following reasons:

1. That no issue was there raised relating to the appropriation of water to beneficial consumptive use by any party, including the Federal Power Commission, under State law or otherwise. In fact such issue could not have been raised because of the provisions of Section 27 of the Power Act reading:

Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

Certainly, by the use of such language Congress was even then cognizant of and reserving to the States the control of the appropriation rights according to their laws.

2. The case at bar deals directly with the right of appropriation to beneficial consumptive use of water pursuant to State law. The paramount issue is, does the Consent to Suit Act mean what the language thereof imports, i.e., when the United States is joined as a defendant in any suit for the adjudication of rights to the use of water of a river system or other source, for the administration of such rights where it appears that the United States is the owner of, or in the process of acquiring, water rights under State law—shall be deemed to have waived any right to

plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty.

That issue was not before any Court in the Pelton Dam Case. The Consent to Suit Act was not invoked nor mentioned by any party in that case. Here the very foundation of the case is laid by a supreme law of the land enacted by the Congress, a legislative body possessing the constitutional power to so legislate. Said act contains no provision limiting its effect to public lands as distinguished from reservations or any other form of use or ownership of land. In brief, this point was well summarized by the Supreme Court in *Leather Mfrs. National Bank v. Cooper*, 120 U.S. 778:

A suggestion was made in argument that the case is one arising under the laws of the United States for the reason the cause of action is identical with that sued on in *Leather Manufacturers' National Bank v. Morgan*, 117 U.S. 96, decided by this Court at the last term, and in which the principles of law which govern the rights of the parties were determined. Nothing of the kind, however, appears in the record, *and if it did it would not authorize a removal. This is not that suit, and a case does not arise under the laws of the United States simply because this Court, or any other Federal Court, has decided in another suit the questions of law which are involved.* (Italics supplied.)

It is submitted that the conclusion of law is, that the Pelton Dam Case is not determinative of the case at bar.

CONCLUSIONS RE. OPINION AND DECISION
OF THE DISTRICT COURT

R-57-83, 165 Fed. Supp. 600

I.

THE SOVEREIGNTY OF THE UNITED STATES

The opinion of the Lower Court discloses only a meager interpretation of the Consent to Suit Act. That Court placed strong reliance upon the sovereignty of the United States as interpreted by Chief Justice Marshall in *McCullock v. Maryland*, and as interpreted in the *Ivanhoe Water District Cases*, and *United States v. Public Utilities Commission of California Case*. R-67-70, 76-77, 78-81.

The Appellant does not contend that said cases do not state the Appellate Courts' view of sovereignty as therein set forth. However, it is axiomatic that in the interpretation of a Court's opinion the thought must be kept in mind the facts and circumstances upon which the case arose, and also the state of the law applicable thereto. In none of those cases did the facts and circumstances parallel or approach the facts and circumstances of the case at bar. In brief, said cases are of no more controlling effect here than the *Pelton Dam Case* hereinabove distinguished.

The Appellant is not seeking to impugn the sovereignty of the United States. It recognizes and supports the well-grounded theory of the law of the supremacy of the Appellee, and agrees that in all matters constitutionally within the ambit of its powers are beyond the reach of state power, unless otherwise provided by an Act of Congress.

It may well be that had the Appellee at the inception of its public land policy in the Western States applied the same or similar rules, regulations and statutory provisions with respect to the

waters therein as it provided for the minerals thereof, that a totally different system of the control of such waters would have been effected and the sovereign powers of the Appellee thereover retained.

However, as pointed out hereinbefore, the Courts, and the Congress by legislation, have in fact confirmed and settled the State ownership and control of the non-navigable waters of any source for beneficial consumptive use within its borders. That the Congress believed the State water laws well served to equitably protect and apportion the beneficial use of the waters cannot well be denied, to the contrary it provided by statute that the United States should be amenable thereto.

It is further to be noted that the Consent to Suit Act is not the only expression of the will of Congress that the water laws of the Western States are to be the rule of decision with respect to the appropriation and use of the waters of such States by respective departments, bureaus and officers of the United States. Many of the Congressional Acts covering a period of many years so providing are cited in the Appendix to this brief.

The Appellant is of the opinion that in this case the Lower Court gave undue weight to the sovereignty of the Appellee. That it failed to give due consideration to the Water Appropriation Laws of the State and the effect thereof as applied to the Appellee pursuant to the provisions of the Consent to Suit Act.

It is common knowledge, of which it is submitted this Court may take judicial notice, that the appropriative rights to the beneficial consumptive use of waters in the arid West are interlocking in character. Each individual use is a detriment to a like use by another individual use. These uses must be coordinated so that all of the users of available water may receive their allotted shares. To accomplish this, the Western States enacted their respective laws in order that the public waters so necessary to the economic

welfare of such States be allotted in as equitable manner as possible. The Supreme Court in *Pacific Live Stock Co. v. Oregon Water Board*, 241 U.S. 447, well said of such laws:

“* * * All claimants are required to appear and prove their claims; no one can refuse without forfeiting his claim, and all have the same relation to the proceeding. It is intended to be universal and to result in a complete ascertainment of all existing rights, to the end, first, that the waters may be distributed, under public supervision, among the lawful claimants according to their respective rights without needless waste or controversy; second, that the rights of all may be evidenced by appropriate certificates and public records, always readily accessible, and may not be dependent upon the testimony of witnesses with its recognized infirmities and uncertainties; and, third, that the amount of surplus or unclaimed water, if any, may be ascertained and rendered available to intending appropriators.”

It needs no citation of authority to show that any individual or entity entering a State and there appropriating and using the waters of the State without complying with the laws of that State is certainly using such waters to the detriment of those possessing the legal right thereto through compliance with the law. And if such individual or entity may do so with impunity and continue such use, then indeed the result will be, as aptly stated by the Senate Committee in Report No. 711, page 5: “If such a condition is to continue in the future it will result in a throw-back to the conditions that brought about the enactment of the statutory water laws, i.e., the necessity that public waters so necessary to the economic welfare of the arid States be allotted in as equitable manner as possible to all users of the available supply thereof.”

As pointed out hereinbefore, in 1939 Nevada adopted a comprehensive Underground Water Appropriation Act for the very purpose of conserving such waters and providing therein the same

method of securing the appropriative rights to the beneficial consumptive use thereof that appertained to surface waters. In brief, establishing order in lieu of chaos with respect to underground waters that it had long ago established for surface waters.

It is submitted that Congress used most significant language in the composition of the Consent to Suit Act when it said, "The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State Laws are inapplicable or that the United States is not *amenable thereto by reason of its sovereignty* * * *." (Italics supplied.) Sovereignty alone of the United States is not the criterion upon which to base the inapplicability of the State Laws.

II

THE STATE OF NEVADA DID NOT CEDE TO THE UNITED STATES JURISDICTION OVER AND CONCERNING THE STATE-OWNED WATERS WITHIN THE NAVAL DEPOT AREA.

The Nevada Act ceding jurisdiction (R. 51, 61) provides that the State "hereby cedes jurisdiction to the United States upon and over the land and within the premises of that certain area, situate near Hawthorne * * *." There is no mention there nor elsewhere in the Act of the ceding of jurisdiction over the property of the State.

As pointed out hereinbefore in this brief, long years before the establishment of the Naval Depot, Nevada adopted the State ownership of the waters of the State above and beneath the surface of the ground based upon the law as sanctioned with approval by the Supreme Court of the United States. Not only did the State claim ownership by reason of well established law, but

provided the means by which the use of its property could not only be acquired, but also, be protected from undue infringement thereof.

It is to be noted, however, the Lower Court did not rely upon the cession of jurisdiction act as relinquishing State control of the waters in question. The Court after quoting the act said, "in view of the stipulation, supra, that 'full title' to the land in question has been in the defendant at all times since the cession by Mexico in 1948, reliance on Nevada's cession is unnecessary." R. 66. Thus the Lower Court adverted to the Federal ownership of waters by reason of its ownership of lands as disposing of the issue, irrespective of the weight of the law to the contrary.

Adverting to the cession act it is the position of the Appellant (1) that the underground waters in question were and are the property of the State, (2) that said waters were subject to the right of appropriation to beneficial use by the United States pursuant to State Law, (3) that the disposal of the ownership or control of State owned property can be had only upon the State legislative authorization therefor.

The lands comprising the Naval Depot were not acquired by the United States in the first instance for any of the purposes provided in Article I, Section 8, Clause 17, the exclusive jurisdictional provision of the Federal Constitution. Neither were such lands purchased by the United States with the consent of the Nevada Legislature, nor did the United States in 1864 reserve any portion of such lands for military or other purpose save that of a proprietor, with the right to dispose of the unappropriated public lands as provided in Section 4 of the Nevada Enabling Act.

It has long been settled law that where the public lands of the United States within a State are not acquired or reserved as above stated that it is incumbent upon the United States to secure

cession of jurisdiction from the State if any or some exemption from State control is desired.

Fort Leavenworth R. R. Co. v. Lowe, 114 U.S. 525; Chicago Rock Island and Pac. Ry. Co. v. McGlinn, 114 U.S. 542.

The question is—did the Nevada Legislature in 1935 cede Nevada's jurisdiction and plenary control of waters above and/or beneath the surface of the lands within the Naval Depot to the United States?

Statutory grants by the Legislature, where sovereign power is delegated or where it is sought to derogate from sovereign authority, are construed strictly against the grantee.

Black, Interpretation of Law, 2d Ed. 499; Six Companies v. Devinney, 2 Fed.Supp. 693, D.C. Nevada, construing Nevada Act of 1921 ceding jurisdiction to United States, Secs. 2895–2898 N.C.L. 1929. Larson v. South Dakota, 278 U.S. 429.

The act ceding jurisdiction to the United States was and is in derogation of Nevada's sovereignty, and being subject to strict construction conveys no title to its property, particularly where Nevada theretofore, by a public act of its Legislature, imposed restrictions upon the alienation of its property. Where, as here, such property is the State owned water and subject to appropriation to beneficial consumptive use only pursuant to its water appropriation laws.

“If a state, by a public act of its legislature, imposes restrictions upon the alienation of its property, every person who takes a transfer of such property must be held affected by notice of them. Alienation in disregard of such restrictions can convey no title to the alienee.”

49 Am.Jur. 272, Sec. 58; Texas v. White 7 Wall (U.S.) 700, 19 L.Ed. 227.

It is respectfully submitted that the record in this case shows beyond question that the officers and representatives of the United States were cognizant of and were affected with notice of the restrictions on the alienation of Nevada's property in the waters in question, and that they were endeavoring to comply strictly with such restrictions.

III

THE PLENARY CONTROL OF THE NAVAL AMMUNITION DEPOT BY THE UNITED STATES DOES NOT CONSTITUTE "EXISTING RIGHTS" TO THE BENEFICIAL CONSUMPTIVE USE OF THE UNDERGROUND WATERS WITHIN THE MEANING OF THAT TERM IN THE 1939 UNDERGROUND WATER ACT.

The Lower Court was of the opinion that Section 1 of the Underground Water Act of 1939 providing, "All underground waters of the State belong to the public, and subject to all existing rights to the use thereof, and subject to appropriation for beneficial use only under the laws of the State," recognized as "existing rights" of the United States by reason of the "full title" to the lands of the Depot being in the United States since the cession from Mexico. R-66.

The Appellant dissents from such view for all of the reasons hereinbefore in this brief set forth. Briefly, that the waters above and beneath the surface of the ground in this State constitute property of the State and are subject to appropriation to beneficial consumptive use pursuant to its laws. And further, that the Congress in the Consent to Suit Act provided that the United States

“shall be deemed to have waived any right to plead that the State laws are inapplicable.”

Section 9 of the 1939 Underground Water Act, provides:

“A legal right to appropriate underground water for beneficial use from an artesian well or from a definable aquifer by means of a well, tunnel, or otherwise drilled, bored, or otherwise constructed subsequent to March 22, 1913, or from a well, tunnel, or otherwise tapping percolating water, the course and boundaries of which are incapable of determination, that was drilled, bored, or otherwise constructed subsequent to March 25, 1939, can only be acquired by complying with the provisions of the general water law of this state pertaining to the appropriation of water.”

This statutory provision clearly defines the meaning of “existing rights” theretofore contained in the language of Section 1 of the act, i.e., “subject to all existing rights of the use thereof.” R-5. In brief, that the beneficial consumptive use of waters developed from an artesian well, or developed from a definable aquifer by means of a drilled well, tunnel or other method prior to March 22, 1913, constitutes an existing right within the meaning of the term. Likewise, the use of waters developed from a well, tunnel, or other method tapping percolating water the course and boundaries of which are incapable of determination prior to March 25, 1939, constitutes an existing right within the meaning of the term.

The Navy wells in question were drilled from on and after February 15, 1942, to and including September 15, 1945. R-11, 52, 62. And were so drilled after the enactment of the Underground Water Act in 1939.

The said wells were not drilled on any area of land theretofore designated by the State Engineer as a basin containing underground waters. They were, however, drilled in accordance with the provisions of Section 6 of said act relating to the sinking of

wells in basins that had not theretofore been designated as an underground basin, reading :

“In other basins or portions therein which have not been designated by the state engineer as aforesaid where the water sought to be (4) appropriated is underground water existing in unconfined aquifers and not being under any hydrostatic artesian pressure, no application or permit to appropriate such water is necessary until after the well is sunk or bored and water developed. Before any legal diversion of water can be made from said well the appropriator must make application to the state engineer in accordance with the provisions of the general water law of this state for a permit to appropriate such water.”

This fact was alleged by plaintiff in paragraph III of the Complaint. R-6, 12.

Further, after completion of the wells and in accordance with the provisions of the aforesaid Section 6, and accompanying State laws, the Officers of the United States made due applications for permits to appropriate the waters developed in and by said wells. R-12-15, 52-54.

It may well be that had the United States caused the drilling of the said wells to completion prior to March 25, 1939, such wells may *then* have become “existing rights,” within the meaning and intent of the law.

THE NATIONAL DEFENSE ASPECT OF THE CASE

R-78-82, 90

The Lower Court in its opinion and conclusions of law, stressed the National Defense Powers of the United States as the compelling reason for the dismissal of the action. The Appellant has no

quarrel with such powers, nor the grounds upon which they are premised. However, the record here fails to disclose any substantial basis upon which it is or can be claimed such powers were or would be endangered by reason of the State laws in question.

The uncontradicted evidence herein is most clear that upon the completion of the drilling of the Navy wells that the Officers of the United States diligently made application to appropriate to beneficial use the waters thereof in strict accordance with the laws of the State, and perfected such applications clear to the point where there only remained one simple step to be taken to perfect the unquestioned title to the right of use.

Further, it is not unreasonable to assume that the Officers of the United States in the perfecting of the right to the use of the waters in question in accordance with the laws of the State were not unaware of the National Defense Powers of the Nation. Certainly they were imbued with it. But, be that as it may, the Naval Department of the United States dropped the applications for permits for the water rights in question upon the rule of the Supreme Court in the Pelton Dam Case, not upon the ground of interference with the National Defense Powers.

There is no evidence herein that the powers of the United States for any purpose in the use of the waters, or otherwise, had been, were, or would be interfered with by the State and/or its officers. The rights to the use of the waters of the Navy wells, when perfected, would have been senior in time to all except one well within the town of Hawthorne, and, of course, senior in time to any subsequent wells in the same area surrounding the Depot area hereafter drilled. Not without reason has the Appellant hereinbefore shown interlocking character of water rights.

SENIORITY OF RIGHT TO THE BENEFICIAL
CONSUMPTIVE USE OF THE WATERS OF
NEVADA WAS AND IS PREMISED UPON THE
RULE "FIRST IN TIME FIRST IN RIGHT"
LONG AGO ADOPTED BY THE WATER LAWS
OF THE WESTERN STATES.

The Supreme Court of Nevada in *Lobdell v. Simpson*, 2 Nev. 274 (1866), held that as between persons claiming rights to the use of the water by appropriation, the one "has the best right who is first in time."

Subsequent to the *Lobdell* case the doctrine of riparian rights was recognized by the Nevada Courts in some cases. However, in 1885 the matter was set at rest in the case of *Jones v. Adams*, 19 Nev. 78, by the Court holding that the riparian doctrine did not serve the wants and necessities of the people for either mining or agriculture, and that in consequence the doctrine of prior appropriation had been universally applied. Since 1885 the riparian doctrine has not been the rule of decision. The Legislature of Nevada long ago by statute has made the law of appropriation the guiding principle, and wrote such principle into the Underground Water Act of 1939.

Said Act was also enacted upon another principle of water law pertaining to the use of underground waters, i.e., the "American Rule" or "Doctrine of Reasonable Use and Correlative Rights." This rule is well stated in 56 Am.Jur. 596, Sec. 114. Appellant quotes in part:

"While the common-law or English doctrine has, as already seen, been followed in most of the early decisions in this country, and is still adhered to in some states, its

soundness has been challenged on the ground that the doctrine of absolute ownership is not well founded in legal principles, and is not so commended by its practical application as to require its adoption, and that the better rule is that the rights of each owner being similar, and their enjoyment dependent on the action of other landowners, their rights must be correlative and subject to the maxim that 'one must so use his own as not to injure another,' so that each landowner is restricted to a reasonable exercise of his own rights and a reasonable use of his own property, in view of the similar rights of others."

Such rule was well sustained in *Snake Creek Min. and Tunnel Co. v. Midway Irr. Co.*, 260 U.S. 596.

The very essence of the Law of Appropriation of Water with respect to the availability thereof for use is the priority of right. Such right in Nevada is granted and protected by the law. The senior appropriator is entitled to insist upon the fulfillment of his right, both as to surface and underground waters. Under Nevada law the State Engineer is the officer of the State charged with the duty of administering its water laws in accordance with the priorities of right.

The State Engineer, *inter alia*, is even vested with the power to restrict the drilling of wells in any underground basin or portion thereof where it appears that additional wells would unduly interfere with existing wells. Sec. 10, Underground Water Act.

It needs no citation of authority to show that in the arid Western States the increased beneficial consumptive use of the waters deplete the available supply thereof both above and beneath the surface of the ground.

The evidence in this case is that the rights to the beneficial consumptive use of the waters developed in the Navy Wells were rights senior in time to all wells in the near vicinity of the Naval

Depot area except the one well of the Town of Hawthorne. All other wells drilled thereafter would be accorded rights junior to those of the Naval Wells, provided, of course, the Naval Wells' rights had been perfected in accordance with the State law, and thus be entitled to the protection of those rights as against the junior appropriators.

The seniority question is of grave importance. It is common knowledge that the arid West, including Nevada, is the only area left in the nation whereby the great increase in population can find lands upon which to establish homes, farms, ranches and industrial projects. Water of all sources of supply is vitally necessary for these purposes.

In this case the Officers of the United States were well on the road to establish the priority rights to the use of the waters of the wells in question pursuant to State law, but dropped the matter just short of perfecting the title to such priority of use.

It is clear that no priority of use of the waters in question was established under State law. If not so established, then when such priority of use is or may be questioned by any interested party whose right to the beneficial consumptive use of the waters of the same or adjacent underground basin was or is perfected under the same State law, is curtailed or jeopardized by the use of the Navy Wells, what law will then be the rule of decision?

Thus the circumstances of this case presents questions of far reaching effect, not alone as to the effect thereof upon the rights to the beneficial consumptive use of the waters of the Navy Wells, but of more importance, the effect upon the future administration of the waters of a sovereign State of the Union in cases where the United States claims the right to the use of such waters premised upon the sovereignty of the United States. Particularly is this true in view of the explicit language of Congress in the Con-

sent to Suit Act, that in any such case the United States shall be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty.

THE APPELLANT'S STATEMENT OF POINTS
RELIED UPON (R. 94-97) HAVE BEEN COL-
LECTIVELY TREATED HEREIN.

This case was tried upon the pleadings and an agreed stipulation of facts, consequently there is no assignment of errors pertaining to the introduction of evidence. In brief, the issues herein were issues of law as applied to the facts. The points relied upon by Appellant were and are combined and merged in their entirety in the Lower Court's construction and interpretation of the law of the case. The Lower Court in such interpretation concluded as a matter of law that Appellant's construction thereof was erroneous and ordered dismissal of the action. R. 88-91.

The Appellant has hereinbefore fully stated its conception of the law of the case. The basic, in fact the true issue, before the Lower Court and here, is the sovereign control of non-navigable waters within the boundaries of a State of the Union, as developed over a period of ninety years pursuant to State law sanctioned by the Courts, including the Supreme Court of the United States, and concurred in by Congressional legislation, all as hereinbefore set forth.

The Appellant therefore respectfully submits that the decision and judgment of the United States District Court was erroneous and not in accord with law.

CONCLUSION

Appellant respectfully submits, in view of the fact that for ninety years and more the Western States have labored to bring order out of chaos with respect to the beneficial use of the waters thereof pursuant to their respective laws, acquiesced in and sanctioned by the Congress of the United States, and also by its Courts, even sanctioning the State ownership thereof, that to preserve such order, the Appellant is entitled to a judgment, declaratory in character, sustaining its interpretation of the law.

Respectfully submitted,

ROGER D. FOLEY,
Attorney General

W. T. MATHEWS
Special Assistant Attorney General

WILLIAM N. DUNSEATH,
Special Assistant Attorney General



APPENDIX

FEDERAL STATUTES RECOGNIZING STATE LAW AS THE BASIS OF WATER RIGHTS

The following Congressional enactments are a number of those statutes relating to the beneficial use of waters wherein the laws of the State governing the appropriation thereof were invoked, and they are collected here, prefaced with the reminder from *United States v. Jefferson Electric Manufacturing Co.*, 291 U.S. 386, 396.

“As a general rule where the legislation dealing with a particular subject consists of a system of related general provisions indicative of a settled policy, new enactments of a fragmentary nature on that subject are to be taken as intended to fit into the existing system and to be carried into effect conformably to it, excepting as a different purpose is plainly shown.”

Section 8 of the Reclamation Act of 1902, 32 Stat. 390, 43 U.S.C. sections 372, 383 (1952) provides:

“That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: Provided, That the right to the use of water acquired under the provisions of this Act shall be

appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right."

Of like import, in connection with the State control of the distribution of water, are: Section 17 of the Act of July 9, 1870, 16 Stat. 218, 43 U.S.C. 661 (1952); Section 1 of the Desert Land Act of March 3, 1877, 19 Stat. 377, as amended, 43 U.S.C., section 321 (1952); Section 18 of the Act of March 3, 1891, 26 Stat. 1101, as amended, 43 U.S.C., section 946 (1952); Act of February 26, 1897, 29 Stat. 599, 43 U.S.C., section 664 (1952); Act of March 2, 1897, 29 Stat. 603; Act of June 4, 1897, 30 Stat. 36, 16 U.S.C., section 481 (1952); Section 25 of the Act of April 21, 1904, 33 Stat. 224; Section 4 of the Act of February 1, 1905, 33 Stat. 628, 16 U.S.C., section 524 (1952); Act of March 3, 1905, 33 Stat. 1020; Act of June 21, 1906, 34 Stat. 375; Act of March 1, 1907, 34 Stat. 1035; Act of May 30, 1908, 35 Stat. 560; Act of March 3, 1909, 35 Stat. 812; Section 2 of the Warren Act of February 21, 1911, 36 Stat. 926, 43 U.S.C., section 524 (1952); Section 11 of the Act of December 19, 1913, 38 Stat. 250; Federal Power Act of June 10, 1920, 41 Stat. 1068, 1077, 16 U.S.C., sections 802 (b), 821 (1952); Section 18 of the Boulder Canyon Project Act of December 21, 1928, 45 Stat. 1065, 43 U.S.C., section 617q (1952); Section 3 of the Taylor Grazing Act of June 28, 1934, 48 Stat. 1271, 43 U.S.C., section 315b (1952); Section 14 of the Boulder Canyon Project Adjustment Act of July 19, 1940, 54 Stat. 779, 43 U.S.C., section 618m (1952); Section 3(b) of the Great Plains Water Conservation and Utilization Projects Act of October 14, 1940, 54 Stat. 1121, 16 U.S.C., section 590z-1(b) (1952); National Parks Act of August 7, 1946, 60 Stat. 885, 16 U.S.C., section 17j-2 (1952); Section 3(e)

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No. 16389

**In the United States Court of Appeals
for the Ninth Circuit**

**THE STATE OF NEVADA, Ex REL. HUGH A. SHAMBERGER,
STATE ENGINEER, APPELLANT**

v.

THE UNITED STATES OF AMERICA, APPELLEE

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA**

**BRIEF FOR THE UNITED STATES OF AMERICA,
APPELLEE**

PERRY W. MORTON,
Assistant Attorney General,
HOWARD W. BABCOCK,
United States Attorney,
Reno, Nevada.

DAVID R. WARNER,
CHARLES G. LUELLMAN,
Attorneys,
Department of Justice,
Washington 25, D. C.

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v.

THE UNITED STATES OF AMERICA, APPELLEE

*APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA*

**BRIEF FOR THE UNITED STATES OF AMERICA,
APPELLEE**

OPINION BELOW

The District Court's opinion is reported at 165 F. Supp. 600. And see R. 57-82.

JURISDICTION

This suit was initiated in the Fifth Judicial District Court in the State of Nevada in and for the County of Mineral, summons and complaint being served on the Attorney General of the United States on December 7, 1955 (R. 101). Jurisdiction of the State court was asserted under the Nevada Declaratory Judgment Act, Section 9440, Nevada Compiled Laws, 1929, and

under Section 666, 43 U.S.C. The suit was timely removed by the United States to the United States District Court for the District of Nevada. (R. 101-109.) Subject to appellee's objections to jurisdiction based on lack of consent to be sued and non-justiciability of the controversy, the District Court's jurisdiction rests on 28 U.S.C. § 1331 and § 1441. The jurisdiction of this Court is invoked under 28 U.S.C. § 1291.

QUESTIONS PRESENTED

1. Whether a suit by a State seeking a determination that the United States in the performance of its constitutional functions must conform to the police regulations of the State, when there is involved no interference with rights of property, contract, or person of the complainant State or any person, presents a justiciable controversy.

2. Whether the United States has consented to be sued under the circumstances of this case.

3. Whether the United States must obtain permission from the State of Nevada before it can lawfully make use of percolating ground waters developed in its own wells, drilled at its own expense, upon its reserved lands constituting the Hawthorne Naval Ammunition Depot, of which area Nevada has ceded exclusive legislative jurisdiction to the United States, and which waters are required to provide a water supply for beneficial uses necessary to accomplishment of the purposes of said Depot.

STATUTE INVOLVED

Section 666, 43 U.S.C., enacted as a rider to the Department of Justice Appropriation Act, 1953 (C. 651, Title II, Sec. 208, 66 Stat. 560), provides as follows:

(a) Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

(b) Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

(c) Nothing in this Act shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream.

The relevant portions of other federal and state statutes which are especially pertinent to the argument herein are contained in Appendix B.

STATEMENT

The facts material to this controversy, all agreed to by the parties and set forth in a written Stipulation of

Facts filed with the Court prior to trial (R. 44-57), are stated in some detail in the District Court's opinion (R. 58-64). For the convenience of the Court they are restated here.

Prior to the year 1935, the United States of America, for purposes of the National Defense, established near the Town of Hawthorne, in Mineral County, Nevada, a United States Naval Ammunition Depot. At all times since its initial establishment this Ammunition Depot has been, and it now is, operated and maintained by, and under the jurisdiction of, the Department of the Navy as a major installation in the program of that Department for the Defense of the Nation (R. 44-45).

Title to the lands comprising the Hawthorne Naval Ammunition Depot was first acquired by the United States in 1848, by cession from the United Mexican States under the Treaty of Guadalupe Hidalgo. With minor exceptions not here material, such title has at all times since its original acquisition in 1848 continued to and it now does reside in the United States (R. 45-46).

The said lands comprising the Hawthorne Naval Ammunition Depot have from time to time on and before February 4, 1935, been withdrawn by executive order under authority of acts of Congress from settlement, location, sale, entry and all forms of appropriation, for the exclusive use and benefit of the United States Navy for the development of and use in connection with the Depot. The first such withdrawal was made on October 27, 1926, and the last on February 4, 1935. At all times since the dates of the several withdrawals, the lands covered thereby have been held and administered by the United States as essential parts of the Depot (R. 46).

Upon admission of Nevada into the Union, the people of that State, in its behalf, by ordinance enacted and adopted on July 28, 1864, as a part of the State Constitution, did

forever disclaim all right and title to the unappropriated public lands lying within said territory.

That ordinance, enacted "In obedience to the requirements of an act of the Congress of the United States, approved March twenty-first, A. D. eighteen hundred and sixty-four" was, by its own express terms as well as by the terms of the Act of Congress referred to,

irrevocable, without the consent of the United States * * *. [R. 46-50.]

By an act of its legislature approved March 28, 1935, the State of Nevada ceded to the United States exclusive jurisdiction "upon and over the land and within the premises" of the Hawthorne Naval Ammunition Depot, reserving only the power to tax private property situated, and to serve process, within the premises. This cession of jurisdiction has been at all times since March 28, 1935, and it now is in full force and effect (R. 50-52).

Between approximately February 15, 1942, and September 15, 1945, the United States drilled and put into operation six wells within the boundaries of the Depot (R. 52). These wells were drilled upon lands the title to which had been in the United States at all times since 1848 (R. 45-46) and which had been withdrawn and reserved for the development of and use in connection with the Depot (R. 46) as hereinabove noted. They were and are required in order to provide a water supply for beneficial uses necessary to accomplishment of the purposes of the Depot (R. 52).

The waters tapped and developed by these wells were and are percolating waters, and the development and operation of the wells does not interfere, and has at no time interfered, with any vested right of any person (R. 52).

Although the said wells had been constructed and operated since their construction by the United States without regard to the statutes of Nevada relating to the appropriation and use of underground waters, the Commanding Officer of the Depot, on or about July 29, 1949, filed in the Office of the State Engineer of Nevada an application for permit to appropriate to beneficial use the waters of each of said wells and thereafter took further proceedings as provided for by the Nevada statutes relating to the appropriation of underground waters (R. 52-54). However, on July 25, 1955, the Commanding Officer of the Depot advised the State Engineer that "the applications for water rights with regard to the wells are being dropped and no continuing action is expected." (R. 54-55). On September 7, 1955, the State Engineer made an order in which he declared that in his opinion the use of ground water from said wells was contrary to the laws of the State of Nevada and illegal, and he ordered that "unless steps be taken within thirty (30) days" [to comply with the Nevada ground water law] "the use of water from said wells cease." (R. 55.) The United States, believing the Nevada law inapplicable and the State Engineer without jurisdiction in the premises, has not complied with that order (R. 55-56).

During the years 1954 and 1955 two additional wells were drilled by the United States on the Hawthorne Naval Ammunition Depot. Those wells are in the same status as the six wells drilled earlier, except that

no application of any kind was made to the State Engineer with respect to them (R. 88).

Upon failure of the United States to comply with the State Engineer's order of September 7, 1955, within the time therein specified, the State of Nevada, under asserted authority of § 666, 43 U.S.C., and for the purpose of securing a judicial determination "of its rights, status, and legal relations under its laws pertaining to the appropriation to beneficial use of the underground waters of said State by the United States and its government" (R. 3), filed its complaint for declaratory judgment against the United States of America in the Fifth Judicial District Court in the State of Nevada in and for the County of Mineral. By that complaint Nevada sought judgment declaring, *inter alia*, that the underground waters within the Depot are the property of the State of Nevada and the public within its boundaries, and that the use of said waters by the United States is contrary to the laws of Nevada and illegal (R. 18-19).

Summons and the complaint were served on the Attorney General of the United States on December 7, 1955 (R. 101). On December 27, 1955, the cause was removed to the United States District Court for the District of Nevada (R. 101-109). Appellee's motion to dismiss based on failure to state a claim on which relief could be granted and lack of consent to be sued was overruled and the matter proceeded to trial (R. 110-112, 113-114). The United States' objections to jurisdiction were preserved in its answer (R. 37-38). Prior to the trial, the parties filed the stipulation of facts which appears at pages 44-57 of the printed record and at the trial on January 14, 1957, additional facts were stipulated. The matter was submitted on the facts

so agreed to and admitted by the pleadings (R. 92). On August 27, 1958, the District Court filed a written opinion determining on the merits that the complaint be dismissed (165 F. Supp. 600; R. 57-82), and on October 6, 1958, the Court entered its Findings of Fact, Conclusions of Law, and Judgment in accordance with that opinion (R. 85-92). Notice of appeal to this Court was filed on December 5, 1958, (R. 93).

SUMMARY OF ARGUMENT

I

The court below should have dismissed appellant's complaint for lack of jurisdiction. The controversy presented is nonjusticiable because there is involved no injury, or threat of injury, to rights of property, contract, or person, and the question whether Nevada's laws regulating the use of underground water are enforceable against the United States within the Hawthorne Naval Ammunition Depot is purely a political question, not meet for judicial settlement. Furthermore, § 666, 43 U.S.C., upon which appellant relies for consent by the United States to be sued, consents only to joinder of the United States as a defendant in suits for general adjudication of the relative rights of the several users of water of a river system or other source, where it appears that the United States is a necessary party because it is the owner of or in the process of acquiring rights to the use of water. This is not such a suit. On the contrary, appellant seeks a determination that the United States has *no* right to use the waters in question. The United States has not consented to be sued in cases of this kind.

II

If jurisdiction be assumed, then the district court's judgment of dismissal on the merits must be affirmed. In the first place, Nevada's underground water law has no application within the Hawthorne Naval Ammunition Depot because Nevada ceded exclusive jurisdiction over the area to the United States even before the law which she seeks to enforce was enacted. By this cession of jurisdiction Nevada's authority to legislate with respect to the area was terminated, except for the reserved power to tax private property. Even had the Nevada statute been in effect at the time jurisdiction was ceded, it would still not be enforceable within the area by Nevada. For the "international law rule," whereby some laws of the former sovereign authority existing at the time jurisdiction is ceded continue in effect until abrogated or changed by the new sovereign, does not apply with respect to State laws which require administrative action on the part of State officials. Even those pre-existing laws which do continue in effect within the ceded area are effective only as laws of, and are to be enforced by, the sovereignty to which jurisdiction is ceded.

III

But without regard to the matter of legislative jurisdiction, the United States in the performance of its constitutional functions need not comply with the police regulations of a State. Here it is admitted that the wells in question are required in order to provide a water supply for beneficial uses necessary to accomplishment of the purposes of the Depot, a major installation in the program of the Department of the Navy for the defense of the Nation. The fact that

the United States would be required to compensate if by its use of the underground waters there were an invasion of vested rights of others—a possibility which under the facts of this case is not even suggested—does not mean that the United States may perform its functions within the reservation, using the waters there found as necessary for the performance of those functions, only if and as permitted by Nevada law.

IV

Appellant's assertion of ownership of the ground waters underlying the Hawthorne Naval Ammunition Depot cannot be sustained. The waters tapped by the Navy wells are percolating waters and as such are part and parcel of the soil itself. Ownership thereof, or of the right to use the same, cannot be separated from the ownership of the land. But without regard to the stipulated fact that these underground waters are percolating waters, they are appurtenant to the reserved lands of the United States and the United States' right to use the same is not subject to control by Nevada. Title to the lands on which the wells are drilled, and to substantially all the lands within the reservation, has been continuously in the United States since their cession by Mexico in 1848. Title to the right to use the waters appurtenant to those lands continues in the United States today unless the United States has disposed thereof. The United States' ownership of the public lands in Nevada and of the right to use the waters appurtenant thereto did not pass to the State upon Nevada's admission into the Union—the people of Nevada, as required by the Enabling Act, expressly disclaimed “all right and title to the unappropriated public lands lying within said territory.” Appellant's

assertion of ownership by reason of the Desert Land Act of 1877 and related acts of 1866 and 1870 is misplaced. In the first place, these acts apply only with respect to the "public lands." They do not apply with respect to unappropriated waters on lands withdrawn from the public lands and reserved for governmental purposes of the United States. In the second place, there is nothing in these acts which can be construed as a grant of title from the United States to the States. The purpose of the Acts of 1866 and 1870 was merely recognition and sanction of *possessory rights* on public lands asserted under local laws and customs. The Desert Land Act severed, *for purposes of private acquisition*, soil and water rights on public lands, and provided that such water rights were to be acquired in the manner provided by the law of the State of location. This was done in furtherance of the land disposal policy of the United States in the Desert Land States. But there is nothing in any of these acts which in any way limits the right of the United States to use the unappropriated waters prior to their appropriation by the public or which in any way authorizes the States to regulate or control the use by the United States of such waters. Since title to the right to use the unappropriated waters on the public and reserved lands of the United States has not been transferred to the States such title remains in the United States, free of any right or authority in the States to control the United States' use thereof. Section 666, 43 U.S.C., was intended merely to waive the sovereign immunity of the United States in a specified kind of suit. It is not a substantive law. Even if it were applicable to a case such as this, it was not intended to, and it does not, mean that the United States, when sued under its as-

serted authority, may not rely upon the Constitution and laws of the United States as sources of right and authority.

ARGUMENT

The trial court's decision on the merits is correct. However, we believe the case does not present a justiciable controversy and that the court below lacked jurisdiction also because the United States has not consented to be sued under the circumstances of this case. The first section of this brief is therefore devoted to a statement of the reasons why we believe the district court should have dismissed for lack of jurisdiction without considering the merits of the controversy.

I

The Court Below Had No Jurisdiction of the United States or of the Subject Matter of the Action.

A. The controversy presented by the pleadings and the stipulated facts is not a justiciable controversy.

“The development and operation of said wells does not interfere, and has at no time interfered, with any vested right of any person.”

So it has been stipulated (R. 52).

Essentially, Nevada's complaint says no more. For it does not assert that the use by the United States of the ground waters under the Hawthorne Naval Ammunition Depot has impaired, does impair or threatens to impair the vested rights of any other water user or users.¹

¹ At page 17 of appellant's opening brief, it is stated that at the trial it was agreed by counsel for the United States “that two wells had been drilled by and in the Town of Hawthorne tapping the underground waters, one well senior in time and one junior in time to the six Navy wells, the waters of which were appropriated

It is therefore apparent that there is presented here for determination "no case of private rights or private property infringed, or in danger of actual or threatened infringement * * *." *Georgia v. Stanton*, 73 U.S. (6 Wall.) 50, 77 (1867). There is no "honest and actual antagonistic assertion of rights by one individual against another." *Muskrat v. United States*, 219 U.S. 346, 359 (1911). Nor is there any assertion of such

according to law." There is nothing in either the printed record or in that part of the record in the district court omitted from the printed record which supports this statement. No such agreement was made. No such fact was proved. No such fact was alleged. The only wells referred to in the pleadings or in the agreed facts are the wells drilled by the United States on the reservation area and the stipulated fact is that "the development and operation of said wells does not interfere, and has at no time interfered, with any vested right of any person." When, at the trial, counsel for appellant requested a stipulation that two wells had been drilled by the City of Hawthorne on City of Hawthorne land, counsel for the United States responded: "If your Honor please, the United States is prepared to go to trial in this case on the issues framed by the pleadings. We do not consider relevant to the issues, as stated by plaintiffs, the wells of the City of Hawthorne. We have a particular conviction in that connection, in view of the failure of the complaint to allege any conflict between uses made by the United States and any uses made by any other water user in the area. As your Honor suggested in his remarks, we feel that so far as the pleadings and the stipulated fact with respect to non-interference with other water users are concerned, it doesn't make any difference how many other wells there are in the area. We would have some concern if evidence as to the existence of the City of Hawthorne wells were to be received in the case, as to whether that, by implication or any other manner, injects an additional issue in the case which isn't presently in, and for that reason we would object vigorously to the offer of evidence of that kind under the present pleadings, and we would also object to the amendment of the pleadings at this time to include an allegation with respect to the city's wells." (Transcript of Proceedings, January 14, 1957, pp. 4-5). The district court did not accept appellant's Proposed Amendment to Finding of Fact No. XI (R. 83). This refusal was eminently proper because there was no evidence to support the proposed finding and there was no issue to which it was relevant.

rights by plaintiff in its own behalf or in behalf of any of its citizens. *Arizona v. California*, 298 U.S. 558, 566 (1936).

That "the rights in danger * * * must be rights of persons or property, not merely political rights" in order to call for or permit exercise of the judicial power has long been recognized. *Georgia v. Stanton*, *supra*, at page 76.

Nevada does ask a declaration that the underground waters within the Depot are the property of and belong to the State, a proposition which as a matter of law cannot be sustained. *Infra*, pp. 57 *et seq.* But we think it is clear that she does not seriously contend for more than that in exercise of the police power of the State she may control the use of such waters.² She does not assert any use by her that is being injured or thwarted. She says only that the actions by the United States are "illegal." Since no use by any other water user has been impaired, the complaint plainly involves only asserted control by the State in the exercise of police regulations.

It is even more clear that the ultimate question for decision on the merits is whether the United States in the exercise of its constitutional functions relating to the national defense—on a federally-owned military reservation over which the State has ceded, for all purposes here material, exclusive legislative jurisdiction—must conform to such police regulations of the State.

² There can really be no question but that the Nevada ground water law is referable to the police power of the State. *Vineyard Land & Stock Co. v. District Court*, 42 Nev. 1, 171 Pac. 166, 173, 174 (1918); *Pacific Live Stock Co. v. Lewis*, 241 U.S. 440, 448, 449 (1916); *In re Maas*, 219 Cal. 422, 424, 27 P. 2d 373 (1933); Kinney on Irrigation and Water Rights, 2d Ed., vol. 3, sec. 1341, pp. 2428, 2429; Wiel, Water Rights in the Western States, 3rd Ed., vol. 2, sec. 1184, p. 1097; 30 Am. Jur., Irrigation, sec. 3, p. 851.

The Supreme Court of the United States has often considered the fundamental question, and has always answered in the negative.³ Contrary to the implications of appellant's opening brief (see particularly the appendix thereto), there is no law of the United States applicable here similar to Section 8 of the Reclamation Act of 1902 (43 U.S.C. § 383) directing conformity to State law. Even if there were, it would not operate to bar the United States from using the water in question in the performance of its functions on this reservation, but would simply require that compensation be paid to the owners of rights recognized under the law of the State if those rights were invaded by the United States' use. *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275, 291 (1958). And see *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950).⁴

³ Constitution of the United States of America, Art. VI, Cl. 2:

This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Arizona v. California, 283 U.S. 423, 451 (1931):

The United States may perform its functions without conforming to the police regulations of a State.

Oklahoma v. Atkinson Co., 313 U.S. 508, 534-535 (1941):

* * * And the suggestion that this project interferes with the State's own program for water development and conservation is likewise of no avail. That program must bow before the "superior power" of Congress. * * *

And see *Florida v. Mellon*, 273 U.S. 12, 17 (1927), and *infra*, pp. 49-56.

⁴ Thus even were it true that Nevada is the owner of a usufructuary right in the waters in question and that that right is being invaded by the United States, the United States' use would not be unlawful. On the contrary, there would be a taking by the United States by inverse condemnation, Nevada would have an adequate

But this is not an appropriate case even to consider the answer to that fundamental question on its merits. For here there is not presented a disputed question of "rights of persons or property" such as is necessary to bring into play an exercise of the judicial function involving a resolution of the question.

Rather, we submit, the matter presented here is "not meet for judicial determination." *Colegrove v. Green*, 328 U.S. 549, 552 (1946). It is not unlike the question presented in *Georgia v. Stanton*, *supra*, p. 13, where the plaintiff State sought to enjoin the Secretary of War and other executive officers of the United States from carrying into execution certain acts of Congress which, it was contended, would destroy the corporate existence of the State by depriving it of the means whereby its existence might and otherwise would be maintained. The bill was dismissed on the ground that the question presented called for judgment on a political, as distinguished from a judicial, question. In distinguishing its decision in an earlier case between sovereign States, the court, at page 73, said:

The objections to the jurisdiction of the court in the case of Rhode Island against Massachusetts

remedy under the Tucker Act, and she could not have the relief she seeks here. As the Supreme Court said in *Berman v. Parker*, 348 U.S. 26, 36 (1954):

* * * The rights of these property owners are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of taking.

And in *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682, 697 (1949): "Where the action against which specific relief is sought is a taking or holding of the plaintiff's property, the availability of a suit for compensation against the sovereign will defeat a contention that the action is unconstitutional as a violation of the Fifth Amendment." And see *Hurley v. Kincaid*, 285 U.S. 95 (1932); *Crozier v. Krupp*, 224 U.S. 290 (1912); *Yearsley v. Ross Construction Co.*, 309 U.S. 18 (1940).

were, that the subject-matter of the bill involved sovereignty and jurisdiction, which were not matters of property, but of political rights over the territory in question. They are forcibly stated by the Chief Justice, who dissented from the opinion. [12 Peters, 752, 754.] The very elaborate examination of the case by Mr. Justice Baldwin was devoted to an answer and refutation of these objections. He endeavored to show, and we think did show, that the question was one of boundary, which, of itself, was not a political question, but one of property, appropriate for judicial cognizance; and, *that sovereignty and jurisdiction were but incidental, and dependent upon the main issue in the case.* The right of property was undoubtedly involved; * * *. [Emphasis supplied.]

And from the opinion of Mr. Justice Thompson in *Cherokee Nation v. Georgia*, 30 U.S. (5 Peters) 1 (1831), the Court at page 75, 73 U.S., quoted with approval: “ ‘This court can grant relief so far, only as the rights of persons or property are drawn in question, and have been infringed’.”

With respect to the bill before it, the Court said at page 77:

That these matters, both as stated in the body of the bill, and, in the prayers for relief, call for the judgment of the court upon political questions, and, *upon rights, not of persons or property, but of a political character*, will hardly be denied. For the rights for the protection of which our authority is invoked, *are the rights of sovereignty, of political jurisdiction, of government, of corporate existence as a State, with all its constitutional powers*

and privileges. No case of private rights or private property infringed, or in danger of actual or threatened infringement, is presented by the bill, in a judicial form, for the judgment of the court. [Emphasis supplied.]

The fact that the bill averred that the plaintiff would be deprived of the possession and enjoyment of certain State-owned property was insufficient to make a judicial question where it was apparent the references to such property were merely incidental to the main purpose of having declared the relative rights of sovereignty.

Texas v. Interstate Commerce Commission, 258 U.S. 158, 162 (1922), is also in point. The question presented was whether certain powers given by Congress to the Interstate Commerce Commission and the Railroad Labor Board were within the field reserved to the States. The Court said:

Obviously this part of the bill does not present a case or controversy within the range of the judicial power as defined by the Constitution. It is only where *rights*, in themselves appropriate subjects of judicial cognizance, are being, or about to be, affected prejudicially by the application or enforcement of a statute that its validity may be called in question by a suitor and determined by an exertion of the judicial power. *Georgia v. Stanton*, 6 Wall. 50, 73 et seq.; *Muskrat v. United States*, 219 U.S. 346, 361; *Stearns v. Wood*, 236 U.S. 75, 78.

Laying aside for the moment the political nature of the issue presented by the complaint, the practical tone

of Nevada's argument on appeal seems to be one of fear that some day the Navy wells might interfere with uses by other water users. Appellant's Opening Brief, pp. 50-51.⁵ She is not concerned with any present or threatened physical injury (R. 52). Her fears stem solely from speculation as to future activities of the United States and from speculation as to future uses by others. There is nothing in the record to indicate that those fears will ever be realized. We have shown *supra*, at footnote 1, that appellant's reference even to the existence of the City of Hawthorne wells is not proper in the light of the record in this case. Even if their existence were judicially noticeable and Nevada were able in a suit like this to litigate the City's rights (both of which propositions we deny), there is no evidence of any relationship between them and the United States' wells and the agreed fact is that there is no interference with any vested right with respect to them or with any other vested right (R. 52). As a result Nevada's complaint, even if capable of amendment by her brief on appeal, is grounded solely on assumption.

A complaint based merely upon "assumed potential invasions" of rights is not enough to warrant judicial intervention. See *Arizona v. California*, 283 U.S. 423, 426 (1931). There, Arizona claimed that the congressional act providing for the construction of what is now

⁵ Appellant says: "It is clear that no priority of use of the waters in question was established under State law. If not so established, then when such priority of use is or may be questioned by any interested party whose right to the beneficial consumptive use of the waters of the same or adjacent underground basin was or is perfected under the same State law, is curtailed or jeopardized by the use of the Navy Wells, what law will then be the rule of decision?" We submit that that question will be appropriate for decision when, *but not until*, an interested party does complain that his rights are "curtailed or jeopardized by the use of the Navy Wells."

Hoover Dam would invade her quasi-sovereign rights by preventing the State from exercising its right to prohibit or control under its own laws the appropriation of unappropriated waters flowing within or on its borders. In deciding this cause was not ripe for judicial determination, the Court observed that there was no allegation of definite physical acts that were interfering, or would interfere, with future appropriations by the State. The Court noted further, in connection with State allegations that plans were drawn and permits granted for the taking of additional water in Arizona under its laws, that the acts of the Secretary of the Interior threatened no physical interference with those projects, and that the federal act authorizing the dam and reservoir interposed no legal inhibitions on their execution. 283 U.S. at 462-464. Here, of course, Nevada does not even contemplate using the waters in question for any State project.⁶ *A fortiori*, the State has put forth no justiciable cause.

Other cases also illustrate the proposition that the judicial power does not extend to abstract questions having to do solely with the delineation of sovereignty. In *New Jersey v. Sargent*, 269 U.S. 328 (1926), the

⁶ Appellant virtually conceded the nonjusticiability of the cause when she noted in her reply brief in the court below that the state engineer "granted" Naval officers a three-year period of time to further study the question of water availability before completing the requirement of filing proofs of beneficial use. She closed her brief by asking: "Does such fact show any disposition on the part of the State and/or its officers to deny use of water to the United States or even to interfere in any manner with such use?" (R. 69). And in her opening brief on appeal, Nevada says at p. 48 that "there is no evidence herein that the powers of the United States for any purpose in the use of the waters, or otherwise, had been, were, or would be interfered with by the State and/or its officers." What, we ask, does Nevada plan to do with the waters in question—*other than issue a permit authorizing the very uses which she has put in issue here?*

Court dismissed the bill of New Jersey which sought to obtain a judicial declaration that in certain features the Federal Water Power Act exceeded the authority of Congress and encroached upon that of the State. And a bill of the United States against West Virginia was dismissed because general allegations that the State challenged the claim of the United States that the rivers in question were navigable, and asserted a right superior to that of the United States to license their use for power production, raised an issue "too vague and ill-defined to admit of judicial determination." *United States v. West Virginia*, 295 U.S. 463, 474 (1935).

The Supreme Court's description of an allegation in *New York v. Illinois*, 274 U.S. 488, 489 (1927), is an apt description of Nevada's complaint here. "[I]t does not show that there is any present use of the waters * * * which is being or will be disturbed; nor that there is any definite project for * * * using them which is being or will be affected; * * *."

As the matter presented by the allegation there referred to was nonjusticiable, so also is the cause here. For here there is presented for resolution, in the language of the same Court in *United States v. West Virginia, supra*, at page 473, no more than a "difference of opinion between the officials of the two governments" whether there is power and authority in the State to control the use by the United States of the waters within its defense establishment.

The fact that this is a suit for declaratory judgment does not put a justiciable complexion on Nevada's asserted cause. The Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202, does not change the constitutional requirement for a justiciable case or controversy.

See *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 325 (1936), and *United States v. West Virginia*, *supra*.

B. *The United States of America has not consented to be sued in or otherwise waived its sovereign immunity from suits of this character.*

(1) *No suit against the United States can be maintained in the absence of congressional consent.*

It is elementary that without specific statutory consent no suit may be brought against the United States. *United States v. Shaw*, 309 U.S. 495, 500 (1940). "The United States, as sovereign, is immune from suit save as it consents to be sued." *United States v. Sherwood*, 312 U.S. 584, 586 (1941). "The rule of immunity of the Federal Government from suit without its consent to be sued is all-embracing and is applicable to all kinds of actions." 54 Am. Jur., United States, sec. 128, p. 635. And see *Minnesota v. United States*, 305 U.S. 382, 387 (1938); *Arizona v. California*, 298 U.S. 558, 568 (1936); *Belknap v. Schild*, 161 U.S. 10, 17 (1896).

The fact that this is a suit for declaratory judgment does not establish jurisdiction. The Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202, does not in itself authorize suit against the United States, but provides an additional remedy only where the jurisdiction of the court has already attached by virtue of some other statute. See *Aetna Casualty & Surety Co. v. Quarles*, 92 F. 2d 321, 323 (C.A. 4, 1937), wherein the Court said: "The Federal Declaratory Judgment Act * * * is not one which adds to the jurisdiction of the court, but is a procedural statute providing for an additional remedy for use in those cases and controversies

of which the federal courts already had jurisdiction * * *.” Particularly pertinent here is the following language of this Court in *Brownell v. Ketcham Wire & Manufacturing Co.*, 211 F. 2d 121, 128 (1954): “* * * [T]he Declaratory Judgment Act * * * is not a consent of the United States to be sued, and merely grants an additional remedy in cases where jurisdiction already exists in the court * * *.”

(2) *Section 666, 43 U.S.C., authorizes the joinder of the United States as a defendant only in suits which are sui generis, relating to the general adjudication of rights to the use of water of a river system or other source.*

For the consent of the United States to be sued, without which this suit must fail, appellant relies solely on 43 U.S.C. § 666, enacted as a rider to the Department of Justice Appropriation Act, 1953. The full text of the section appears *supra*, pp. 2-3.

But this act does not grant such consent. It authorizes the *joinder* of the United States as a defendant only in suits for the adjudication or administration of rights to the use of water of a river system or other source. This is not such a suit.

“Joinder” is a word of art in the law. It connotes the uniting of two or more parties on one side of a suit. “Joinder of parties” is defined by *Black* as “the uniting of two or more persons as co-plaintiffs or as co-defendants in one suit.” And the materials following demonstrate that the term cannot mean otherwise as it is used in § 666.

A suit for the adjudication of water rights is an action *sui generis*. Wiel, *Water Rights in the Western States*, 3rd Ed., vol. 2, p. 1125; *Holbrook Irrigation*

District v. Fort Lyon Canal Co., 84 Colo. 174, 195, 269 Pac. 574, 582 (1928); *Hough v. Porter*, 51 Ore. 318, 439, 98 Pac. 1083, 1109 (1909). Such a suit is common in the law of the western states in one form or another. Wiel, *supra*, pp. 1120, 1125. A characteristic of such a suit is that all known claimants to the water supply involved must be joined and their individual rights determined by the final decree. The reason for this is pointed out by the court's opinion in *Washington State Sugar Co. v. Sheppard*, 186 Fed. 233, 235-236 (C.C., D. Idaho, N.D., 1911):

* * * [I]t is highly important that all claimants to the right to divert the water of a natural stream for beneficial purposes should be brought into the same court in a single action, and therein be required to wage their claims, in order that such claims, necessarily more or less interdependent and conditioned one upon the other, may be settled and defined by a single decree. The cogency of the reasons for such course is so thoroughly appreciated that almost invariably the state courts in the arid region, where the doctrine of appropriation prevails, have shown solicitude and have exercised great care in requiring that all claimants be made parties in suits of this character.

This universal requirement of joinder of all claimants and the general nature of such suits are further illustrated by the opinions of authorities set out in the margin.⁷

⁷ The Supreme Court of the United States, construing the Oregon statute relative to adjudication proceedings: "* * * [T]he proceeding in question is a *quasi* public proceeding, set in motion by a public agency of the State. All claimants are required to appear and prove their claims; no one can refuse without forfeiting his

That this rule is not a requirement of statutory adjudication suits only appears from a recent decision of this Court. In *People of the State of California v. The United States of America*, 235 F.2d 647, 663 (1956), this Court said:

The only proper method of adjudicating the rights on a stream, whether riparian or appropriative or mixed, is to have all owners of land on the watershed and all appropriators who use water from the stream involved in another watershed in court at the same time.

The trial court violated this principle by issuing a declaratory judgment as to the right of the United States as against one claimant whose rights were junior, which had the effect of preventing

claim, and all have the same relation to the proceeding. It is intended to be universal and to result in a complete ascertainment of all existing rights, to the end; First, that the waters may be distributed, under public supervision, among the lawful claimants according to their respective rights without needless waste or controversy; Second, that the rights of all may be evidenced by appropriate certificates and public records, always readily accessible, and may not be dependent upon the testimony of witnesses with its recognized infirmities and uncertainties, and, Third, that the amount of surplus or unclaimed water, if any, may be ascertained and rendered available to intending appropriators.

* * * * *

“* * * In such a proceeding the rights of the several claimants are so closely related that the presence of all is essential to the accomplishment of its purpose, and it hardly needs statement that these cannot be attained by mere private suits in which only a few of the claimants are present, for only their rights as between themselves could be determined * * *.” *Pacific Live Stock Co. v. Oregon Water Board*, 241 U.S. 440, 447 *et seq.* (1916).

The Supreme Court of Utah: The state statute providing for water rights' adjudications “was enacted for the purpose of providing a statutory remedy whereby all parties claiming rights to use waters from any given source could be brought before the court so that

a trial of the other water rights involved without giving a hearing as to the individual owners.

A suit to which the whole number of known claimants to the water supply in question are not joined is not an adjudication suit within the generally accepted meaning thereof, or within the meaning of 43 U.S.C. § 666. Neither is a suit such as this.

The legislative history of § 666 shows that the Congress intended to consent to the *joinder* of the United States in general adjudication suits only. The then Chairman of the Senate Committee on the Judiciary stated that the act

is not intended to be used for any other purpose than to allow the United States to be joined in a suit wherein it is necessary to adjudicate all of the rights of various owners on a given stream.

all conflicting claims could be adjudicated in one action." *Spanish Fork West Field Irrigation Co. v. District Court of Salt Lake County*, 99 Utah 527, 536, 104 P. 2d 353, 357 (1940).

The Supreme Court of Nevada: "The proceedings under the water law is a quasi-public proceeding wherein all claimants to the use of waters of a stream system may have their claims adjudicated, to the end that the waters of the stream may be distributed under public supervision, without needless waste or controversy." *State ex rel Hinckley v. Sixth Judicial District Court*, 53 Nev. 343, 352, 1 P. 2d 105, 106 (1931).

The United States District Court for the District of Oregon: "It is a case where divers and sundry parties are entitled to so much of the waters of a stream as they have put to beneficial use and the purpose is to ascertain their respective rights by a simple, economical, effective and comprehensive proceeding, and it is not a separable controversy between different claimants." *In Re Silvies River*, 199 Fed. 495, 503 (D. Ore., 1912).

Wiel, *supra*, sec. 1222, p. 1120: "In most of the states having special water codes, special statutory proceedings in court are provided, following a method which originated in Colorado, whereby all claimants on a stream are brought into court in a single suit and a decree rendered seeking to fix permanently the rights of each."

This is so because unless all of the parties owning or in the process of acquiring water rights on a particular stream can be joined as parties defendant, any subsequent decree would be of little value. [Emphasis supplied.]⁸

But in demonstrating the inapplicability here of § 666 we are not restricted to the language of the statute and to the legislative history as disclosed by Senate Report No. 755. In *Miller v. Jennings*, 243 F.2d 157, 159 (C. A. 5, 1957), *cert. denied* 355 U.S. 827, 855, suit for declaratory and injunctive relief with respect to asserted rights to use the waters of the Rio Grande River was brought by several water users and the water district of which they were constituents against the United States and other defendants. The Court of Appeals, in affirming the lower court's dismissal of the case, denied plaintiffs' claim of the applicability of § 666 in the following language:

The United States has not given its consent to be joined as a defendant in every suit involving water rights. It may be made a party only in suits "for the adjudication of rights to the use of water of a river system or other source." There can be an adjudication of rights with respect to the upper Rio Grande only in a proceeding where all persons who have rights are before the tribunal. The Ninth Circuit Court of Appeals has most succinctly stated the doctrine in this manner:

"The only proper method of adjudicating the rights on a stream, whether riparian or appropria-

⁸ Report No. 755, 82d Cong., 1st Sess., p. 9. See Appendix A hereto. In that appendix there are set forth additional excerpts from the Report which show that only general adjudication suits were contemplated by the language of the statute in question.

tive or mixed, is to have all owners of lands on the watershed and all appropriators who use water from the streams involved in another watershed in court at the same time.” *People of the State of California v. United States*, 9 Cir., 1956, 235 F.2d 647, 633. See *Pacific Live Stock Co. v. Lewis*, 241 U.S. 440, 36 S.Ct. 637, 60 L.Ed. 1084.

A suit for adjudication of water rights within the generally accepted meaning thereof and within the meaning of § 666 is just what Senator McCarran described in his letter to Senator Magnuson, included in Senate Report No. 755, and it is what the Fifth Circuit Court of Appeals described in *Miller v. Jennings*—a proceeding to determine the relative rights of all users “on a given stream” or other source.⁹ Appellant does not seek such a determination. It does not ask to have its rights to use water determined as against all other users from a source defined for purposes of the litigation.¹⁰

On the contrary, appellant by her complaint seeks only a determination that the use by the United States of the waters underlying the Hawthorne Naval Ammu-

⁹ In further support of the proposition that only general adjudication suits are within the contemplation of § 666, we again emphasize the use of the word “join” in the first phrase of the statute. Had Congress intended to authorize suits such as this against the United States, it is to be assumed it would not have used language which is adapted only to suits involving more than one defendant.

¹⁰ The failure of the complaint and of the evidence to define a river system or other source of water in which other water users claim conflicting rights (see R. 52) should also be considered in determining the applicability of the statute in question. It is clear from the language of the statute and from the legislative history that only proceedings relating to defined sources of water are contemplated.

nition Depot is illegal under the laws of Nevada. The complaint does not ask a determination of the relative rights of the various water users on a river system or other source. It does not ask an adjudication of water rights.

The congressional consent to suits for adjudication cannot be extended by implication to suits such as this. For "It is not * * * [the court's] right to extend the waiver of sovereign immunity more broadly than has been directed by the Congress." *United States v. Shaw, supra*, p. 22, at 502. See also *Belknap v. Schild, supra*, p. 22, at 16; *Minnesota v. United States, supra*, p. 22. Any contention that the statute should be liberally construed to permit this suit is clearly refuted by the following language of the Supreme Court in its opinion in *Larson v. Domestic & Foreign Corp., supra*, p. 16, at 703:

It is argued that the principle of sovereign immunity is an archaic hangover not consonant with modern morality and that it should therefore be limited wherever possible. There may be substance in such a viewpoint as applied to suits for damages. The Congress has increasingly permitted such suits [for damages] to be maintained against the sovereign and we should give hospitable scope to that trend. *But the reasoning is not applicable to suits for specific relief.* For, it is one thing to provide a method by which a citizen may be compensated for a wrong done to him by the Government. It is a far different matter to permit a court to exercise its compulsive powers to restrain the Government from acting, or to compel it to act. There are the strongest reasons

of public policy for the rule that such relief cannot be had against the sovereign. The Government, as representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract rights. [Emphasis supplied.]

Even less, we submit, in a suit which does not even present a disputed question of property or contract right.

Any suggestion that this may be a suit for administration of water rights within the meaning of § 666 even though it is not a suit for adjudication of such rights is not tenable. All that has been said before is equally applicable in this connection. Senate Report No. 755 (Appendix A) makes clear that the reference in the statute to suits for “administration” contemplates situations where the rights to use the waters of a given source have been adjudicated and that the necessity of having all users in court for an effective determination was as much the motivation for consent to suits for administration as it was for consent to suits for adjudication. “Accordingly, all water users on a stream, *in practically every case*, are interested and necessary parties to *any* court proceedings.” [Emphasis supplied.] Appendix A, p. 86. The Court of Appeals for the Fifth Circuit in *Miller v. Jennings*, *supra*, p. 27, determined that the suit there was no more a suit for administration than it was for adjudication. If that case was not, surely this cannot be. And the conclusion is obvious that a suit the sole objective of which is to have declared that the United States has *no* right to use the water under the military reservation in question can by no interpretation of the English language be considered a suit for administration of rights.

(3) *Even were this otherwise a suit of the type contemplated by Section 666, 43 U.S.C., the requirements of the statute for joinder of the United States have not been met.*

The consent granted by the statute on which appellant relies is applicable only "where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit." This language is further demonstrative of the purpose to authorize joinder of the United States only in suits to determine the relative rights of a number of water users.

But Nevada's complaint, rather than meeting this requirement of the statute, denies ownership by the United States of any right to use the water in question and asks a declaration that its use thereof is unlawful. It presents the dilemma that if she were correct in her contentions the suit would nevertheless have to be dismissed for lack of jurisdiction because the consent to suit applies only "where it appears that the United States is the owner of or is in the process of acquiring water rights * * *." ¹¹

¹¹ It is not tenable that appellant's complaint satisfies this requirement of the statute because the Commanding Officer of the Depot, after completion of the first six wells and operation thereof for several years by the United States, in 1949 initiated proceedings before the State Engineer under the Nevada ground water law (R. 52-54). Those proceedings were abandoned and the State Engineer was notified accordingly (R. 55). It was this abandonment and notification which activated the filing of Nevada's complaint, and appellant now asserts and seeks a determination that the United States has *no* right to use the waters. No application of any kind has been made to the State Engineer with respect to the two additional wells drilled in 1954 and 1955 (R. 88).

It is respectfully submitted that Nevada's denial that the United States owns any right to the use of the water in question does not state a case which meets this statutory requirement. It might be that such denial constitutes a statement of a controversy with the United States—a controversy which, we have shown, is not justiciable. But the controversy is not one with respect to which Congress has consented to suit.

Authority to support this proposition would seem unnecessary. But the holding of this Court in *United States v. McIntire*, 101 F. 2d 650 (1939), is as close to being on all fours as is possible when the subject of decision is a different statute. It was there contended that suit against the United States was given by 28 U.S.C. § 41(25) [now 28 U.S.C. § 1347] which provided: "The district courts shall have original jurisdiction as follows: * * * of suits in equity brought by any tenant in common or joint tenant for the partition of lands in cases where the United States is one of such tenants in common or joint tenants." At page 653 the Court said:

Assuming, without deciding, that the word "lands" includes water rights, we think the statute has no application here. The suit is essentially one to determine the validity of the claimed water right, which if valid, might present a question of priority and extent, in that there would then be two rights—one in the United States, and one in appellees McIntire, Pablo and Sterling. However there would be no question as to whether or not the United States owned a part of the latter right, and there is none here. *The right asserted is one which the appellees McIntire, Pablo and Sterling claim*

to own entirely. As such the United States and the named appellees are neither joint tenants nor tenants in common. There being no consent by Congress to the suit, the bill must be dismissed as to the United States. [Emphasis supplied.]

- (4) *Section 666, 43 U.S.C., does not consent that suit may be brought against the United States as sole defendant to secure a declaratory judgment relative to the single question of the need for compliance by the United States with the laws of a State respecting the appropriation and use of underground water. Were the statute to be construed as extending such consent, there would be serious doubt as to its constitutionality.*

We have shown that Section 666 is capable of being construed as granting consent *only* to the *joinder* of the United States as a defendant in suits relating to the general adjudication or rights to the use of water of a river system or other source. We have shown that that consent cannot be extended by implication to suits such as this and that there are “the strongest reasons of public policy” which would preclude any such implication. No stronger case than this for application of the language quoted *supra*, at pp. 29-30, from the *Larson* case could be imagined.

But in addition, we have shown that the sole question presented here is not appropriate for judicial determination—that it is beyond the judicial function and the controversy is therefore non-justiciable. If Section 666 were construed as granting the consent of the United States to be made a party defendant in such a suit, the statute’s constitutionality would be subject

to serious question. In *Muskrat v. United States, supra*, p. 13, at 361, a unanimous court, in denying the validity of the consent to suit act there involved, said:

* * * [The] judicial power, as we have seen, is the right to determine *actual* controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction. The right to declare a law unconstitutional arises because an act of Congress relied upon by one or the other of such parties in determining their *rights* is in conflict with fundamental law. * * * This attempt to obtain a judicial declaration of the validity of the act of Congress is not presented in a "case" or "controversy," to which, under the Constitution of the United States, the judicial power alone extends. * * * The object [of the action] *is not to assert a property right against the Government, or to demand compensation for alleged wrongs because of action upon its part.* The whole purpose * * * is to determine constitutional validity of this class of legislation, in a suit not arising between parties concerning a property right necessarily involved in the decision in question, but in a proceeding against the Government in its sovereign capacity, and concerning which the only judgment required is to settle the doubtful character of the legislation in question. Such judgment will not conclude private parties, when actual litigation brings to the court the question of the constitutionality of such legislation. In a legal sense, the judgment could not be executed, and amounts in fact to no more than an expression of opinion upon the validity of the acts in question. * * * [Emphasis supplied.]

All this would be applicable here if the statute were to be construed as authorizing this suit. We submit that even if there should appear to the Court to be a real question whether Section 666 might be so construed, that construction should be rejected in favor of the construction under which the statute's validity would not be open to question.

(5) *Section 666, 43 U.S.C., does not consent that the will of the Court or of the Legislature or State Engineer of Nevada be substituted for that of the executive officers of the United States who are charged by law with the administration in the interest of the National Defense of the Hawthorne Naval Ammunition Depot. Were the statute to be so construed, there would be serious doubt as to its constitutionality.*

The prayer of the complaint is for certain declarations of the sovereign rights or powers of the State of Nevada with respect to the ground waters under the Hawthorne Naval Ammunition Depot, and that the use by the United States of those waters, being contrary to the laws of Nevada, is illegal. There is no specific prayer for injunctive relief. Nevertheless, the purpose of the suit is to attempt to restrain the use by the United States of those waters absent compliance with the laws of the State. And this should be considered as a suit for injunctive relief in the effort to determine whether consent is given by Section 666.

To test the accuracy of this analysis, it is necessary only to consider the utter futility of a naked declaration upon the specific questions referred to in the prayer if the Court were not to undertake also to compel by its orders conformity to whatever declarations might be

made. The prayer for such other orders "as shall be deemed meet" (R. 19) is proof enough that the complaint contemplates such relief. And the fact that the test for determining jurisdiction in a suit for declaratory relief is whether the controversy might be entertained if the relief sought were injunctive (*Colegrove et al. v. Green, supra*, p. 16, 328 U.S. at 552) indicates the judicial view that injunction is a concomitant of declaratory relief.

In this light, it is appropriate to repeat, emphasize, and re-emphasize these admitted facts.

At all times since its initial establishment, the Hawthorne Naval Ammunition Depot has been, and it now is, operated and maintained by, and under the jurisdiction of, the Department of the Navy as a major installation in the program of that Department for the Defense of the Nation (R. 44-46). The wells in question were and are required in order to provide a water supply for beneficial uses necessary to accomplishment of the purposes of the Depot (R. 52).

In the face of these facts, appellant asks, under purported authority of Section 666, that the United States be directed by the Court to perform its essential constitutional functions at Hawthorne only as the Nevada legislature and, under the State's existing law, her State Engineer may permit the use of the waters necessary therefor.¹²

It is to be emphasized that the validity of no law of the United States relative to the operation of this facility has been challenged. No officer or agent of the United States has been made a party, and no

¹² The fact that appellant suggests no difficulty would be experienced in obtaining such a permit does not alleviate the constitutional problems which granting the relief sought would involve.

question as to the statutory authority of the officers charged by law with operation of the Depot is presented. The only question, for purposes of this portion of the argument, is this: Has the United States consented that the exercise of its constitutional functions may be restrained for lack of compliance with the laws of a State relative to the use of water necessary for the performance of these functions?

We have reviewed briefly, *supra*, p. 15, the authorities demonstrating that the United States in the performance of its functions need not conform to the police regulations of a state. And see *infra*, pp. 49-56. We have shown also, at footnote 4, that if there were an invasion by the United States' use of the waters in question of property rights of the plaintiff or of her citizens, the Tucker Act affords an adequate remedy and no case for specific relief could be made. The reasoning of the cases wherein the courts have denied their authority to control the executive officers of the United States in the exercise of discretionary powers validly conferred by statute is also relevant to this consideration.¹³

Thus, in *Hudspeth County Conservation & Reclamation District No. 1 v. Robbins*, 213 F. 2d 425, 432 (C.A. 5, 1954), *cert. denied* 348 U.S. 833, the court said:

¹³ See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803); *Decatur v. Paulding*, 39 U.S. (14 Peters) 497 (1840); *Riverside Oil Co. v. Hitchcock*, 190 U.S. 316, 324 (1903). It is also to be noted that no statute of the United States has been cited authorizing the Secretary of the Navy or his subordinates to follow the procedure for which Nevada contends. Specific statutes applicable to other activities of the United States have no application with respect to the use of water on military reservations. As noted *supra*, p. 15, even a statute like Section 8 of the Reclamation law, if applicable here, would not support the relief which appellant seeks.

* * * Whatever may be the merits of the plaintiffs' contentions, the court would have no jurisdiction by declaratory judgment, see *Lynn v. United States*, 5 Cir., 110 F. 2d 586, 588, or by injunction against Government officers to substitute itself in any part of the management and operation of the dams, reservoirs and facilities for the agency designated by Congress. * * *

In *New Mexico v. Backer*, 199 F. 2d 426, 428 (1952), the Tenth Circuit Court of Appeals stated the problem in this language:

The Rio Grande Reclamation Project was constructed and operated in the exercise of a proper governmental function and in accordance with valid statutes of the United States. The facilities were owned by the United States and the waters were stored in the reservoir to be withdrawn by the United States for authorized governmental purposes. The management, control, and operation of such facilities are given the Secretary of the Interior in broad terms, 43 U.S.C.A. § 373. The United States could not hold or operate this vast project except through its officials and agents. Backer was performing these functions for the Secretary of the Interior and under his instructions. Whatever he did, he did for the Secretary under authority of the reclamation laws of the United States. The operation of the project and facilities depended upon the flow of water from the reservoir. If this flow could be enjoined or affected by court decree or order directed to Backer, he would be under the direction of the court and not his superiors as representatives of the United States.

It would be a complete ouster of the United States over the control and management of its own property and facilities.

And we repeat here the language of the Supreme Court in the *Larson* case, hereinabove quoted at pages 29-30:

* * * For, it is one thing to provide a method by which a citizen may be compensated for a wrong done to him by the Government. It is a far different matter to permit a court to exercise its compulsive powers to restrain the Government from acting, or to compel it to act. *There are the strongest reasons of public policy for the rule that such relief cannot be had against the sovereign.* The Government, as representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract rights. [Emphasis supplied.]

Although in *Belknap v. Schild*, *supra*, p. 29, at 17, the Supreme Court said "unless expressly permitted by act of Congress, no injunction can be granted against the United States," it is of the utmost significance that neither in that case nor in any other decision of an appellate court has it been found that the Congress has extended such permission.¹⁴

In the face of these precedents, it is inconceivable

¹⁴ The opinion of the United States District Court for the Southern District of California in *Rank v. Krug*, 142 F. Supp. 1, represents the only declaration which has been found by *any* court to the effect that Congressional consent to injunction against the United States has been granted. That case is now pending on appeal to this Court, No. 15840.

that there can be found by implication¹⁵ in a statute "not intended to be used for any other purpose than to allow the United States to be joined in a suit wherein it is necessary to adjudicate all of the rights of various owners on a given stream,"¹⁶ the consent by Congress that the Government *can* be stopped in its tracks by *any* plaintiff who presents *any* disputed question of property or contract rights relating to the use of water. Much less can there be found by implication in that statute the consent of Congress that the Government can be stopped in its tracks by a State, presenting not a question of property or contract rights, but only a question of failure to comply with the police regulations of the State relating to the use of water.

The statute in express terms permits joinder of the United States as a defendant only in suits for the adjudication of rights to the use of water of a river system or other source, or for the administration of such rights. There is no reference to actions such as this for injunctive or declaratory relief. That is in keeping with the view expressed by the Supreme Court in the *Larson* case that "*There are the strongest reasons of public policy for the rule that such [injunctive] relief cannot be had against the sovereign.*"

¹⁵ "It [permission to sue the United States] will not be implied * * *." *North Dakota-Montana Wheat Growers' Assn. v. United States*, 66 F. 2d 573, 577 (C.A. 8, 1933), *cert. denied* 291 U.S. 672.

¹⁶ The language immediately preceding that quoted from Senator McCarran's letter to Senator Magnuson is also especially significant: "S. 18 is not intended to be used for the purpose of obstructing the project of which you speak or any similar project * * *." See Appendix A, p. 89. And see page 6 of the Report (Appendix A, p. 87): "The committee, for the legislative history of this bill, definitely desires to repudiate any such intent which may be deduced from S. 18 and states that this is not the purpose and the intent of this legislation."

[Emphasis supplied.] Since neither injunctive nor declaratory relief is expressly provided for, it necessarily follows that Congress has not waived the immunity of the United States from suits of this character, for, as discussed above: “[The United States] cannot be subjected to legal proceedings, at law or in equity, without their consent; and whoever institutes such proceedings must bring his case within the authority of some act of Congress.” *Belknap v. Schild*, *supra*, p. 29, 161 U.S. at 16.

Were Section 666 to be construed otherwise, additional constitutional questions would be presented. Among such would be the question whether Congress can constitutionally delegate to the courts supervision of the performance by the executive branch of its functions in the operation of a defense establishment such as Hawthorne. Since relief is sought against the United States rather than against specified officers, it must be assumed that judgment for the plaintiff would of necessity, to be effective at all, be binding upon all executive officers, including the President, and perhaps also upon the Congress. The problem would be similar to those dealt with by the Supreme Court in *Mississippi v. Johnson*, 71 U.S. 475 (1866), and by Judge Pope in his concurring opinion in *United States v. United States District Court*, 206 F. 2d 303 (C.A. 9, 1953). *Cf. Marbury v. Madison*, *supra*, footnote 13; *Decatur v. Paulding*, *supra*, footnote 13; *Martin v. Mott*, 25 U.S. 19, 31 (1827); *Riverside Oil Co. v. Hitchcock*, *supra*, footnote 13; *United States v. Ide*, 277 Fed. 373, 382 (C.A. 8, 1921), *affirmed* 263 U.S. 497 (1924); 11 Am. Jur., Const. Law, p. 889, § 190, footnote 1; p. 887, § 188. Congress may not waive the sovereign immunity where the result would be to transfer to the judiciary powers

which under the Constitution repose in the executive branch of the Government. *Cf. Myers v. United States*, 272 U.S. 52 (1926). The doctrine of separation of powers which precludes the legislative branch from assuming to itself executive powers, *Springer v. Philippine Islands*, 277 U.S. 189 (1928), also forbids the transfer of such powers to the judiciary. The authorities discussed *supra*, Part I, A, are also relevant here.

There would be the related question whether Congress can constitutionally delegate to the States, by submitting the United States to suit for specific relief, the power to control, and even to prohibit, by their legislation the actions of Federal officers in performing the constitutional functions of the United States.¹⁷ We note again that a direction to Federal officers to recognize rights vested under State law by the payment of compensation therefor when the same are impaired by the United States (see *supra*, page 15) is quite different from consent to injunctive relief against the use of water if state procedures for appropriation are not followed to acquire an appropriative right to such use.

There would also be the related question whether Congress can constitutionally deny, by permitting specific relief for failure to acquire its rights to the use of water under state appropriation laws, the United

¹⁷ There is nothing in the recent case of *United States v. Sharpnack*, 355 U.S. 286 (1958), which would sanction a delegation. The act under fire there and upheld by the Court adopted certain state law into that body of *federal* law which was to govern *federal* officials in the administration of *federal* justice. Here, however, Congress would be abdicating the powers of the United States rather than exercising them by an adoption process. Constitutional functions of the United States would be subjected to the operation of *state* legislation as administered and interpreted by *state* officials. Nevada would thus be wielding *direct* authority over Constitutional functions of the United States.

States' power of eminent domain to take such property rights as are required for the performance of its functions. The existence of Nevada's Act of March 28, 1935, ceding exclusive jurisdiction to the United States, and the fact that Nevada's claim of ownership of the waters under this reservation of the United States, *infra*, pp. 57 *et seq.* is clearly erroneous, suggest that if Section 666 were construed as authorizing suit to compel compliance by the United States with the Nevada underground water law, there would be still other questions regarding the statute's validity. We submit that, in the light of the plain intention of Congress to consent only to joinder of the United States in general adjudication suits, as evidenced by the language of the statute and its legislative history, a construction of Section 666 which presents constitutional questions such as would be presented by application of the statute to this case should be denied.

In the following discussion of the merits of the matter, additional references to Section 666 will be made from which it will be even further apparent that Congress did not intend that that statute be construed as applying to a case such as this.

II

By Her Cession to the United States of Exclusive Jurisdiction "Upon and Over the Land and Within the Premises" of the Hawthorne Naval Ammunition Depot, Nevada Has Completely Removed That Area, Except for the Reserved Power of Taxation, from the Reach of Her Legislative Powers and from the Area Wherein She Can Enforce Her Legislative Enactments. There is Nothing in § 666, 43 U.S.C., Which Permits a Different Conclusion.

Wholly apart from the question of ownership of the right to use the ground waters under the Hawthorne

Naval Ammunition Depot, and wholly apart from the question whether the State of Nevada can control the operation by the United States of its functions on that reservation, there is a compelling reason, not relied on by the court below, why the relief sought cannot be granted even were the cause justiciable and § 666, 43 U.S.C., were construed as authorizing suits such as this.

By an act of her legislature approved March 28, 1935 (R. 50-51), Nevada ceded to the United States exclusive jurisdiction "upon and over the land and within the premises" of the reservation, reserving only the power to tax private property situated, and to serve process, within the premises. This cession of jurisdiction has at all times since the date of the act been in full force and effect (R. 52).

The United States claims no property rights by reason of this cession of jurisdiction. Indeed, since, as we shall show, Nevada had no right of property in the lands within the reservation or the waters underlying the lands when the cession act became effective, she could have transferred no property right even if the act were capable of being construed as a grant of property—which is not the case.

The effect of Nevada's Act of March 28, 1935, was this: The area within the Hawthorne Naval Ammunition Depot was removed from the area subject to the State's jurisdiction except for the powers to tax privately-owned property and to serve process which were reserved. The power to legislate and to enforce legislative enactments within the area encompassed by the Act was transferred to the United States.¹⁸

¹⁸ "When the Federal Government has acquired exclusive legislative jurisdiction over an area, by any of the three methods of

Appellant's contention that she ceded jurisdiction only over the land and not over the waters within the boundaries of the reservation is disproved by the language of the act itself. She ceded jurisdiction "upon and over the land and within the premises" of the Depot, subject to express reservations which do not include the power to regulate the use of water.

Had Nevada in settlement of a boundary dispute with California made a similar cession to that State over the disputed area, we think there would be no question but that Nevada's power to control the use of underground water within the area would be terminated. By her transfer of jurisdiction to the United States, appellant divested herself of power to legislate with respect to the area just as effectively as she would have done by a cession to California. Her power to enact laws, other than property tax laws, applicable within the boundaries of the reservation came to an end.¹⁹

In *Standard Oil Co. v. California*, 291 U.S. 242, 244 (1934), the Supreme Court in language applicable

acquiring such jurisdiction, it is clear that the State in which the area is located is without authority to legislate for the area or to enforce any of its laws within the area. All the powers of government with respect to the area are vested in the United States. *Pollard v. Hagan*, 3 How. 212, 223 (1845)." (Report of the Interdepartmental Committee for the Study of Jurisdiction over Federal Areas within the States, Part II, A Text of the Law of Legislative Jurisdiction, June, 1957, p. 169. And see following pages of that work.)

¹⁹ Since Nevada had no law purporting to control the use of percolating waters (*Cf.* Section 1 of the Act of March 24, 1915, Nev. Comp. Laws, 1929, Sec. 7987, Appendix B, p. 95,) until she adopted her underground water law in 1939 (Ch. 178, Nev. Laws, 1939), it would appear clear beyond dispute that the law which she seeks here to enforce can have no application within the enclave. We note further, however, that even though "It is a general rule of public law * * * that whenever political jurisdiction and legislative power over any territory are transferred from one

here stated the effect of a cession of jurisdiction similar to that in this case in these words:

In three recent cases * * * we have pointed out the consequences of cession by a State to the United States of jurisdiction over lands held by the latter for military purposes. Considering these opinions, it seems plain that by the Act of 1897 California surrendered every possible claim of right to exercise legislative authority within the Presidio—put that area beyond the field of operation of her laws. Accordingly, her legislature could not lay a tax upon transactions begun and concluded therein.

* * *

The principle approved in these cases applies here. A State cannot legislate effectively concerning matters beyond her jurisdiction, and within territory subject only to control by the United States.

The same Court's language in *Collins v. Yosemite Park Company*, 304 U.S. 518, 530 (1938), is also squarely in point:

nation or sovereign to another, the municipal laws of the country, that is, laws which are intended for the protection of private rights, continue in force until abrogated or changed by the new sovereign" (*Chicago, Rock Island & Pacific Ry. v. McGlinn*, 114 U.S. 542, 546 (1885); Report of the Interdepartmental Committee, Part II, *supra*, footnote 18, at p. 156 *et seq.*), this "international law rule" does not apply with respect to State laws which require administrative action on the part of State officials. (Report of the Interdepartmental Committee, Part II, *supra*, footnote 18, at pp. 161, 162.) The reservation of the right to serve process within the ceded area would not permit enforcement by the State within the enclave of her laws requiring action of administrative officials, even had such a law respecting use of the waters in question been in effect when the cession act became effective (*Id.*, pp. 118 *et seq.*). Even pre-existing laws continuing in effect within a ceded area under the international law rule are effective only as laws of, and to be enforced by, the sovereignty to which jurisdiction is ceded (*Id.*, pp. 157, 158, 162).

* * * [J]urisdiction less than exclusive may be granted the United States. The jurisdiction over the Yosemite National Park is exclusively in the United States except as reserved to California, e.g., right to tax, by the Act of April 15, 1919. As there is no reservation of the right to control the sale or use of alcoholic beverages, such regulatory provisions as are found in the act under consideration are unenforceable in the Park.

There can be no question regarding the manner by which jurisdiction was transferred in this instance. In *Surplus Trading Co. v. Cook*, 281 U.S. 647, 651-652 (1930), the Court said:

As respects such a military reservation—that is, one which is neither excepted from the jurisdiction of the State at the time of her admission nor established upon lands purchased therefor with the consent of her legislature,—the State undoubtedly may cede her jurisdiction to the United States and may make the cession either absolute or qualified as to her may appear desirable, provided the qualification is consistent with the purposes for which the reservation is maintained and is accepted by the United States. *And where such a cession is made and accepted it will be determinative of the jurisdiction of both the United States and the State within the reservation.* [Emphasis supplied.]

Simply that the subject of regulation within the enclave is the use of water does not call for or permit disregard of Nevada's cession act. In *Santa Margarita Mutual Water Company v. United States*, 235 F. 2d 647, 656 (1956), this Court recently declared:

Now it must be conceded by all parties that the United States had sovereign rights in the enclave. The rules governing the use of that property were properly set by the Executive under the Constitution. Its rights within the borders were sovereign, paramount and supreme. This principle applied to the use of water appurtenant to the land. The United States could store the water which came to the land or use it on a different watershed than that of the Santa Margarita without interference from anyone. *The Water Master of the State of California had no authority in the enclave and could not object.* Santa Margarita could not object or prevent the United States from using the water which came onto the land in any way its officers chose. This sovereign authority was essential and was granted by the Constitution. [Emphasis supplied.]

In other words, regardless of who owns the water which occurs under the ground of this Federal enclave, the regulation of its use is beyond the reach of the State of Nevada simply because that State has transferred to the United States any and all power, except as expressly reserved, which she may have had to legislate and enforce her legislation with respect to activity of any kind within the area.

Clearly, there is nothing in § 666, 43 U.S.C., to permit a different conclusion. *Infra*, at pp. 80-85, we treat in somewhat more detail Nevada's contentions with respect to the substantive effect of that statute. In connection with this point of our argument, we note simply that there is nothing in the words of the statute or in its legislative history from which there can be derived

even the faintest glimmer of a Congressional purpose to retrocede to the States all areas over which the United States had previously acquired exclusive jurisdiction.

III

A State May Not Control or Veto Constitutional Activities of the United States. Section 666, 43 U.S.C., Does Not, and Indeed Could Not, Change This.

It is appropriate at this point to recall certain of the stipulated facts and to emphasize their significance. The wells in question were and are required in order to provide a water supply for beneficial uses necessary to the accomplishment of the purposes of the Hawthorne Naval Ammunition Depot (R. 52). The Depot was established for purposes of the national defense (R. 44). It has been at all times and now is operated and maintained by the Department of the Navy as a major installation in the program of that Department for the defense of the Nation (R. 45).

In addition, we again emphasize that the validity of none of the Federal laws under which the reservation has been established and is operated has been challenged. There is no charge of action in excess of statutory authority by the officers of the executive branch of the Federal Government charged with administration of the activity. No federal statute has been cited which even authorizes, let alone directs, the officers of the United States administering the Depot to use the waters in question only as permitted by the State of Nevada or its administrative officers. *Supra*, p. 15.

In view of the foregoing, we submit, Article VI, Clause 2, of the Constitution of the United States com-

pletely dissipates the Nevada claim of authority to control the use by the United States of the waters needed to perform its constitutional functions on this reservation. This conclusion appears to be as clear as the answer to any question that this provision of the Constitution was designed to resolve.

The verity of this proposition saw early articulation by the Supreme Court of the United States. In *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 424 (1819), Mr. Chief Justice Marshall explained:

* * * No trace is to be found in the constitution, of an intention to create a dependence of the government of the Union on those of the states, for the execution of the great powers assigned to it. Its means are adequate to its ends; and on those means alone was it expected to rely for the accomplishment of its ends. * * *

The District Court, correctly, we submit, deemed *McCulloch* of controlling significance. In its opinion, that Court concluded its references to the cogent language of the early decision (R. 70, 165 F. Supp. at 606) with this quotation:

The Court has bestowed on this subject its most deliberate consideration. The result is that the States have no power, by taxation *or otherwise*, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared. [Emphasis supplied.] [*Id.*, at 436.]

The decision in *McCulloch*, as it was more recently explained by Mr. Justice Holmes in *Johnson v. Maryland*, 254 U.S. 51, at 55-56 (1920), “was not put upon any consideration of degree *but upon the entire absence of power on the part of the States to touch*, in that way at least, the instrumentalities of the United States, 4 Wheat. 429, 430, *and that is the law today.*” [Emphasis supplied.]

Moreover, Mr. Justice Holmes concluded his opinion in *Johnson v. Maryland* with observations that we feel are conclusively apposite to the facts and legal posture of this case. He said:

It seems to us that the immunity of the instruments of the United States from state control in the performance of their duties extends to a requirement that they desist from performance until they satisfy a state officer upon examination that they are competent for a necessary part of them and pay a fee for permission to go on. Such a requirement does not merely touch the Government servants remotely by a general rule of conduct; it lays hold of them in their specific attempt to obey orders and requires qualifications in addition to those that the Government has pronounced sufficient. It is the duty of the Department to employ persons competent for their work and that duty it must be presumed has been performed. *Keim v. United States*, 177 U.S. 290, 293. [254 U.S. at 57.]

We submit there is no logical difference between a situation where a state seeks to exact a license requirement from a federal employee driving a mail truck, as in *Johnson v. Maryland*, and the instant situation where the state seeks to exact a permit requirement

from federal representatives managing a defense installation.

The principles spelled out in *McCulloch* and echoed in *Johnson* are applicable to the national defense function of the United States. Const., Art I, § 8, Cl. 1; and see Art. 1, § 8, Cl. 14. This has been demonstrated very recently in *Public Utilities Commission of California v. United States*, 355 U.S. 534 (1958), affirming 141 F. Supp. 168 (D.C. Cal. 1956). There it was held that rates negotiated by the United States with commercial carriers for its military transportation needs were not subject to approval as required by state law.

In *Leslie Miller Inc. v. Arkansas*, 352 U.S. 187 (1956), the Court held that state standards regulating contractors were inapplicable to defense contracts of the United States. In so doing, the Court cited and applied the rationale of *Johnson*, quoted *supra*.

Turning to the specific field of water, we again invite attention to *Arizona v. California*, 283 U.S. 423 (1931). There the State of Arizona sought authority over plans and specifications for what is now Hoover Dam. Arizona contended that approval of the state engineer as prescribed by Arizona laws was a necessary prerequisite to construction of the dam by the Secretary of the Interior. The Supreme Court disposed of this by noting, on pp. 451-452:

* * * If Congress had the power to authorize the construction of the dam and reservoir under its power over navigation, [the Secretary] is under no obligation to submit the plans and specifications to the state engineer for approval. * * *

In the instant situation, Nevada has conceded that the extraction of the waters in question is needed to

accomplish the purposes of the Depot, the operation of which is an exercise of the defense power. And she noted in her opening brief on appeal, at pp. 47-48:

The Lower Court in its opinion and conclusions of law, stressed the National Defense Powers of the United States as the compelling reason for the dismissal of the action. The appellant has no quarrel with such powers, nor the grounds upon which they are premised. * * *

Inasmuch as the withdrawal of the waters is admitted to be in the exercise of the national defense power, the United States, in the language of *Arizona v. California, supra*, "is under no obligation to submit the plans and specifications to the state engineer for approval." And what was said in *Arizona v. California* is all the more significant, we suggest, because that case and this are parallel insofar as both dealt with the status of asserted state control over water *vis-a-vis* a federal power.

We pause here to dispose of what Nevada has said with regard to the exercise by the United States of the defense power. She evidently seeks to salvage her untenable position by asserting on page 48 of her opening brief that "the record here fails to disclose any substantial basis upon which it is or can be claimed such powers were or would be endangered by reason of the State laws in question." We answer in the words of Chief Justice Marshall in *McCulloch*, 17 U.S. at p. 431:

* * * But is this a case of confidence? Would the people of any one state trust those of another with a power to control the most insignificant operations of their state government? We know

they would not. Why, then, should we suppose that the people of any one state should be willing to trust those of another with a power to control the operations of a government to which they have confided their most important and most valuable interests? In the legislature of the Union alone, are all represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused. This, then, is not a case of confidence, and we must consider it is as it really is. [*Id.*, at 431.]

And we repeat here the language of Mr. Justice Holmes, quoted *supra*, p. 51, in his explanation in *Johnson v. Maryland* of the *McCulloch* holding: “*The decision * * * was not put upon any consideration of degree but upon the entire absence of power on the part of the States to touch, in that way at least, the instrumentalities of the United States * * *.*” [Emphasis supplied.]

We doubt that Nevada intimates, by the language quoted from her opening brief, that the use of water on a naval installation is not activity falling within the exercise of the defense power. If she does, however, we meet it with the observation of the Supreme Court that the Tenth Amendment, providing for the reserved rights of the states, does not deprive “the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end.” *United States v. Darby*, 312 U.S. 100, at 124 (1941). And see *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, at 330-331 (1936).

Even were it assumed, *arguendo*, that the exercise of the defense responsibility in this case somehow interferes with state water policy, such interference would be wholly immaterial. For about such a possibility, the Supreme Court in *Oklahoma v. Atkinson Co.*, 313 U.S. 508, 534-535 (1941), said:

* * * [T]he suggestion that this project interferes with the state's own program for water development and conservation is likewise of no avail. That program must bow before the "superior power" of Congress.

It is to be observed that the United States is here performing its constitutional functions directly, by its own officers and employees.²⁰ The authorities we have cited settle beyond dispute that in such cases, the United States is insulated from the application of state police regulations.²¹ The District Court's decision in this respect was clearly correct.

Appellant's claim of authority to control the United States' activities in the operation of the Depot is insupportable even without ultimate regard to Article VI

²⁰ We emphasize this point because we recognize that nondiscriminatory state taxes on activities of contractors, for instance, doing business for the United States have been sustained. Such taxes, at most, increase the costs of operation. *E.g.*, *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937). Here, of course, the state is attempting to impose control on the national government. This cannot be done. See *Public Utilities Commission of California v. United States*, 355 U.S. 534, at 543-544 (1958).

²¹ Another case particularly apposite is *Ohio v. Thomas*, 173 U.S. 276 (1899). In reversing the conviction of the governor of a national soldiers' home for serving oleomargarine contrary to state law, the court said that the federal officer was not "subject to the jurisdiction of the State in regard to those very matters of administration which are thus approved by Federal authority." 173 U.S. at 283.

of the Constitution. For the Constitution has granted to the Union of the States the power to “provide for the common Defence.” Const., Art 1, § 8, Cl. 1; and see Art. 1, § 8, Cl. 14. This provision necessarily divests appellant’s claim of any support, either in law or logic. This is so even without consideration of ownership of the right to use the waters in issue here, and even without regard to the cession of jurisdiction by Nevada to the United States.

For if appellant could grant or withhold a permit to use the waters within the enclave essential to accomplishment of the purposes thereof, she could in effect exercise a power of veto over the constitutional functions of the United States. But such a power cannot exist in a state. In any area where the United States has undertaken to exercise its constitutional authority, there is “no room or need for conflicting state controls.” *First Iowa Coop. v. Federal Power Commission*, 328 U.S. 152, 181 (1946). For a State to exercise such a veto power “would result in the very duplication of regulatory control precluded by the *First Iowa* decision.” *Federal Power Commission v. Oregon*, 349 U.S. 435, 445 (1955).

We again note that we do not contend that the United States could invade with impunity vested rights of others to use the waters in question. But see footnote 1, *supra*, and page 19, *supra*. If there were an impairment of such rights, the United States would be required to compensate. See *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275, 291 (1958). But we do contend that the State is without power to declare that the United States may use these waters only upon compliance with a procedure established by the Nevada legislature. *Id.*, at 295.

Regarding § 666, we note only that there is nothing in either the language of the statute or in its legislative history to suggest that by its enactment Congress intended to attempt to require that in all or any of its water-using activities the United States should utilize water only if permitted to do so by the laws of whatever State or States might be concerned. Any other conclusion, as we point out *supra*, pp. 41-43, would raise serious doubts as to the constitutionality of the statute.

IV

The United States Owns the Right to Use the Waters Underlying the Hawthorne Naval Ammunition Depot. The Use of Such Waters Is Not Subject to Control by the State of Nevada. There Is Nothing in Section 666, 43 U.S.C., Which Permits a Different Conclusion.

A. Such waters are percolating waters and as such are part and parcel of the soil.

Appellant seeks a declaration that the underground waters within the Hawthorne Naval Ammunition Depot are the property of the State and that their use without a permit from the State is therefore illegal (R. 18-19). She intimates that she acquired such ownership upon admission to the Union and, if not by that means, upon passage by Congress of the Desert Land Act of 1877.

But appellant has not established ownership of the waters in question. On the contrary, she has conceded that title to the lands within the reservation has been in the United States at all times since 1848 when the same were ceded to the United States of America by the United Mexican States (R. 45-46). She has stipulated that the waters tapped and developed by the wells

in question are percolating waters (R. 52). She has stipulated that the area wherein such wells are situated has not been designated by the state engineer as a basin or sub-basin, and she has stipulated that the development and operation of said wells does not interfere, and has at no time interfered, with any vested right of any person (R. 52). Her Supreme Court has held that percolating waters are part of and cannot be distinguished from the soil itself. “* * * [S]uch water is not, and cannot be, distinguished from the estate itself, and of that the proprietor has the free and absolute use * * *.” *Mosier v. Caldwell*, 7 Nev. 363, 367 (1872). And see *Strait v. Brown*, 16 Nev. 317, 323 (1881).

Thus, it is to be seen that the percolating waters within the Depot are as much a part of the land as the soil itself. This has been declared to be the law by the Supreme Court of Nevada. It is the law generally.²² Under that rule of law, title to such waters stayed in the United States as owner of the land when Nevada was admitted into the Union in 1864 and disclaimed “all right and title” to the lands here involved as well as to all other unappropriated public lands within the territory (R. 46-50).

Under that same rule of law, title to those waters stays in the United States today. For regardless of all other considerations, Nevada could no more take from the United States the ownership of the percolating waters comprising an inseparable part of the estates

²² In *Kinney on Irrigation and Water Rights*, Vol. 2, p. 2157, § 1190, the rule is stated in these words: “Diffused percolations being but a component part of the earth, or ground, where they are found, it follows that they are not subject to ownership separate and distinct from the soil itself.”

than she could appropriate to ownership by the State the soil itself.²³

On this question, the Supreme Court of California, discussing language in the California Water Code which states, “* * * all water within the State is the property of the people of the State,” has expressed itself this way:

Taken literally, this would include all water in the state privately owned and that pertaining to the lands of the United States, as well as that owned by the state. It should not require discussion or authority to demonstrate that the state cannot in this manner take private property for public use * * *. The constitution expressly forbids it. (Art. I, Sec. 14). The water that pertained to or was contained in the lands of the state was already the property of the people when this [statute] was adopted. *The statute was without effect on any other property.* [Emphasis supplied.]

San Bernardino v. Riverside, 186 Cal. 7, 29-30, 198 Pac. 784 (1921).

Moreover—although were the circumstances otherwise the controlling significance of the foregoing considerations would not be lessened—not until after all of the lands in question had been withdrawn and re-

²³ Under the following subheading, at pp. 76-77, we urge that the Desert Land Act of 1877 and its forerunners were not intended to apply with respect to percolating ground waters. Waters which, by their very nature, in the language of the Nevada Supreme Court, “cannot be distinguished from the estate itself” and which in the words of a respected authority on western water law “are not subject to ownership separate and distinct from the soil itself,” supra, footnote 22, would seem to be incapable of severance from the land in which they occur.

served for the purposes of national defense and not until after Nevada had ceded legislative jurisdiction over the lands in question did the Nevada legislature even assert authority to control the use of percolating waters. For by Section 84 of Chapter 140, Nevada Statutes 1913, § 7970, Nevada Compiled Laws, 1929, Appendix B, p. 95, it was provided that vested rights were not impaired by that act. And by Section 1 of "An Act * * * defining the underground waters which are governed by the laws relating to the appropriation of the public waters of the state * * *," approved March 24, 1915, § 7987, Nevada Compiled Laws, 1929, Appendix B, p. 95, percolating water was expressly excluded from the declaration that all underground water was subject to appropriation under the laws of the State. This express exclusion of percolating waters continued in effect until the then existing underground water law was repealed by the Act approved March 25, 1939, Nevada Statutes, 1939, page 274. And the assumption of control by the terms of the latter Act over all underground waters within the boundaries of the State was "subject to all existing rights."

Inasmuch as the waters in question are part and parcel of the land itself, and are owned by the United States and not by the State of Nevada, it is clear beyond question that their use by the United States as owner of the land is not subject to regulation or control by the State of Nevada. Const., Art. IV, § 3, Cl. 2. This constitutional truism was echoed very recently by the Supreme Court in *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275 (1958). There, the Court held that the United States could say on what conditions its water rights might be used by reclamation project

contractees, even though such terms were in conflict with state law on the matter. Pertinent here is this language from pages 294-295 of the Court's opinion:

* * * In developing these projects the United States is expending federal funds and acquiring federal property for a valid public and national purpose, the promotion of agriculture. This power flows not only from the General Welfare Clause of Art. I, Section 8, of the Constitution, but also from Art. IV, Section 3, relating to the management and disposal of federal property. As this Court said in *United States v. San Francisco*, 310 U.S. 16, 29-30 (1940), this "power over the public land thus entrusted to Congress is without limitations. 'And it is not for the courts to say how that trust shall be administered. That is for Congress to determine.' " [Cases cited.]

Also beyond challenge is the power of the Federal Government to impose reasonable conditions on the use of federal funds, federal property, and federal privileges. [Cases cited.] The lesson of these cases is that the Federal Government may establish and impose reasonable conditions relevant to federal interest in the project and to the overall objectives thereof. Conversely, *a State cannot compel use of federal property on terms other than those prescribed or authorized by Congress. Public Utilities Comm'n of California v. United States*, 355 U.S. 534 (1958). [Emphasis supplied.]

B. *Without regard to the classification of these underground waters as percolating waters, and without regard to the legal implications of such classification, the rights to the use thereof appurtenant to the reserved lands of the United States are not subject to appropriation under the laws of Nevada or otherwise to control by the State.*

1. *Ownership of the right to use such waters was originally acquired by the United States in 1848 under the Treaty of Guadalupe Hidalgo.*

Reference has been made at p. 57, *supra*, to the stipulated fact that at all times since 1848 title to the lands within the reservation has been in the United States. We think it is hardly disputable that when the United States acquired title to the lands it acquired title to all appurtenant rights, including the right to use the underground waters pertaining thereto.

Therefore, unless there has been a grant from the United States to the State of Nevada of the appurtenant rights to the use of water—without regard to the character of those waters—Nevada has obviously failed to establish her claim of ownership of the waters in question and the ownership thereof, or of the right to use the same, must be held to continue in the United States. For in *Utah Light & Power Co. v. United States*, 243 U.S. 389, at 404 (1917), the Supreme Court has explained that:

* * * Not only does the Constitution (Art. IV, § 3, cl. 2) commit to Congress the power “to dispose of and make all needful rules and regulations respecting” the lands of the United States, but the settled course of legislation, congressional and

state, and repeated decisions of this court have gone upon the theory that the power of Congress is *exclusive* and that only through its exercise in some form can rights in lands belonging to the United States be acquired. * * * [Emphasis supplied.] ²⁴

Accordingly, use by the United States of the waters under the ground of its reserved lands cannot constitute an invasion of or interference with state sovereignty. The extraction of the waters by the United States is merely an exercise of its "complete power" over its property. See *United States v. San Francisco*, 310 U.S. 16, at 30 (1940).

2. *Title to such waters or to the right to use them did not pass to Nevada on that State's admission into the Union.*

It has been at least implied by appellant that upon admission of the State into the Union, title to the waters upon and beneath the public lands by some means shifted from the United States to the State. Appellant evidently cites the "equal footing" clause of the enabling act to support such theory. Appel-

²⁴ It is equally clear that, in the absence of federal legislation authorizing State action, such Government-owned property is immune from regulation or control by the State; properly authorized federal agencies may use and regulate the land, as well as its waters and resources, without regard to State regulatory laws. E.g., *Camfield v. United States*, 167 U.S. 518, 526 (1897); *Light v. United States*, 220 U.S. 523 (1911); *Hunt v. United States*, 278 U.S. 96, 100 (1928); *Arizona v. California*, *supra*, p. 19; *United States v. Rio Grande Irrigation Co.*, *infra*, p. 70; *Gibson v. Chouteau*, 80 U.S. (13 Wall.) 92 (1871); *United States v. Oregon*, 295 U.S. 1, 27-29 (1935). If that were not the rule, the properties of the United States would be "completely at the mercy of state legislation." *Camfield v. United States*, *supra*. And see *supra*, pp. 49-57.

lant's Opening Brief, pp. 28-29; Stipulation of Facts, Paragraph V, R. 46, 48, 49.

Clearly refuting such theory is the fact that by her enabling act the people of Nevada were required, as a condition of admission, to "agree, and declare, that they forever disclaim all right and title to the unappropriated lands lying within said territory, and that the same shall be and remain at the sole and entire disposition of the United States; * * *." By her Constitution, the people of the State complied explicitly with that condition (R. 49). This disclaimer, of course, applied to the waters pertaining to the soil as well as to the soil itself.²⁵

It is also to be noted that the "equal footing" clause refers to political rights and sovereignty, as distinguished from economic parity or proprietary rights. In *United States v. Texas*, 339 U.S. 707, at 716 (1950), it was explained:

The equal footing clause has long been held to refer to political rights and to sovereignty. See *Stearns v. State of Minnesota*, 179 U.S. 223, 245.

It does not, of course, include economic stature or

²⁵ There is no distinction in this connection between percolating waters and other appurtenant waters, whether above or below ground. Kinney, in his work on Irrigation and Water Rights, Vol. 2, 2d Ed., Sec. 638, p. 1118, in discussing provisions such as this in enabling legislation, has stated: "In these provisions the waters flowing within the boundaries of the State must be included as a part and parcel of the public lands." In *Hough v. Porter*, 51 Ore. 318, 382, 389, 391, 98 Pac. 1083 (1909), the Supreme Court of Oregon recognized that the United States, as owner of the public domain, had the right and power to provide for disposition of the waters thereon by act of Congress. The disclaimer in the Oregon Admission Act, Act of February 4, 1859, 11 Stat. 383, 384, was in these words: "* * * said State shall never interfere with the primary disposal of the soil within the same by the United States, * * *." [Emphasis supplied.]

standing. There has never been equality among the States in that sense. Some states when they entered the Union had within their boundaries tracts of land belonging to the Federal Government; others were sovereigns of their soil. * * *

In addition, the cases discussed in the immediately following materials in connection with the Desert Land Act show beyond question the complete fallacy of Nevada's argument about the "equal footing" clause.

3. *The Desert Land Act of 1877 applies only with respect to "public lands."* It does not make waters on the reserved lands of the United States subject to appropriation in accordance with local law.

The Desert Land Act of 1877 (19 Stat. 377; 43 U.S.C. § 321) and its predecessors, Section 9 of the Act of July 26, 1866 (14 Stat. 251, 253; 30 U.S.C. § 51) and Section 7 of the Act of July 9, 1870 (16 Stat. 217, 218, 43 U.S.C. § 661), Appendix B, pp. 91-93, appear to be sources of primary reliance for Nevada in support of her claim of title and authority. But even the most cursory examination of the language of those enactments discloses that they apply only to the *public lands*. They do not apply to the reserved lands of the United States. It is well established that by the withdrawal of lands from the public domain the unappropriated waters appurtenant to the lands so withdrawn are set aside and reserved for the purposes of the reservation, and are thereby removed from the operation of the acts of 1866, 1870 and 1877 permitting appropriation and beneficial use by the public of waters on the public lands.

If there could ever have been any doubt about this, it is conclusively settled by the recent decision of the Supreme Court in *Federal Power Commission v. Oregon*, 349 U.S. 435 (1955). In that case Oregon contended that the project there involved would interfere with that State's fish and game regulations, and that the acts of 1877, 1870 and 1866 constituted an express Congressional delegation or conveyance of power to the State to regulate the use of the waters in question.

The Supreme Court rejected the Oregon argument and upheld the Federal Power Commission's authority to license the project. It concluded, *inter alia*, that there was no constitutional question as to the Commission's authority to license a project on reserved lands of the United States. This authority, the Court noted, springs from the Property Clause of the Constitution, Art. IV, § 3, Cl. 2, which provides: "The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."

It was determined that it was not necessary to consider whether the acts of 1877, 1870 and 1866 constituted the express delegation or conveyance of power claimed by the State. This was because, the Court explained, those acts are "not applicable to the reserved lands and waters here involved." 349 U.S. at 448. The Court went on to say:

* * * The Desert Land Act covers "sources of water supply upon the public lands" The lands before us in this case are not "public lands" but "reservations." Even without that express restriction of the Desert Land Act to sources of water supply on public lands, these Acts would not

apply to reserved lands. “*It is a familiar principle of public land law that statutes providing generally for disposal of the public domain are inapplicable to lands which are not unqualifiedly subject to sale and disposition because they have been appropriated to some other purpose.*” *United States v. O’Donnell*, 303 U.S. 501, 510. See also, *United States v. Minnesota*, 270 U.S. 181, 206. The instant lands certainly “are not unqualifiedly subject to sale and disposition. . . .” [Emphasis supplied.]

In light of the Supreme Court’s unequivocal differentiation in that case between public and reserved lands, it is patent that the Desert Land Act and cognate statutes have absolutely no application to the federal military reservation here involved. For the lands within the enclave certainly “are not unqualifiedly subject to sale and disposition.”

It should be noted, moreover, that there was nothing new in the Supreme Court’s determination of that case. In *United States v. McIntire*, 101 F. 2d 650, at 653, 654 (1939), this Court had said, with reference to the contention that the Act of 1866 authorized the appropriation of rights to the use of water within an Indian reservation pursuant to the laws of Montana: “That statute, however, applies only to ‘public lands’.” This conclusion was simply a reaffirmation of the Court’s earlier decision in *Winters v. United States*, 143 Fed. 740, at 747 (C.A. 9, 1906), *affirmed* 207 U.S. 564 (1903). And see *infra*, pp. 69-71.

4. *Even as to unappropriated waters on the “public lands” the Desert Land Act does not transfer ownership to the States.*

Even were it not true that the Desert Land Act and the earlier statutes do not apply to lands reserved for Federal purposes, it is nevertheless emphatically clear that none of them transferred to the States title to the unappropriated waters on the public lands. Speaking of Section 9 of the 1866 statute, the Supreme Court has said:

The object of the section was to give the sanction of the United States, *the proprietor of the lands*, to *possessory* rights, which had previously rested solely upon the local customs, laws, and decisions of the courts, and to prevent such rights from being lost on a sale of the lands. * * * The act * * * continued the system of free mining, holding the mineral lands open to exploration and occupation, subject to legislation by Congress and to local rules. It merely recognized the obligation of the government to respect *private rights which had grown up under its tacit consent and approval*. It proposed no new system, but sanctioned, regulated, and confirmed a system already established, to which the people were attached. Cong. Globe, 1st Sess., 39th Cong., Part IV, pp. 3225-3228. [Emphasis supplied.]

Jennison v. Kirk, 98 U.S. 453, 456-7, 459 (1878).

The Desert Land Act is no more capable of being construed as a grant of title to the unappropriated waters to the States. By the proviso in that Act (43 U.S.C. § 321), Congress simply provided that “the waters of all lakes, rivers and other sources of water

supply upon the *public lands* and not navigable, shall remain and be held free for the appropriation and use *of the public * * **” (Emphasis supplied.) This is not language of conveyance of title to the states—or of irrevocable surrender or abandonment of title in the United States to waters not appropriated in accordance with the authorization.²⁶ Its effect is nothing more than that stated in the court’s paraphrase in *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 162 (1935): “The fair construction of the provision * * * is that Congress intended to establish the rule * * * that all non-navigable waters [on the land] *should be reserved for the use of the public* under the laws of the states and territories named * * *” (Emphasis supplied.) Authorization of the acquisition by individuals of rights to the use of water upon the lands of the United States by following procedures established by local law for the acquisition of water rights is not, of course, a conveyance of title to the States. The United States, continuing to own the public lands and the unappropriated waters pertaining thereto, has the power to withdraw such lands and the appurtenant unappropriated waters for Federal purposes.

A long time ago, the Supreme Court of the United States, recognizing the power of the States to prescribe within their boundaries rules for the use of those

²⁶ *E.g.*, see 43 U.S.C. § 982, where Congress by express and clear language granted swamp and overflowed lands to the states. It is a well-settled maxim of public land law that grants from the United States are strictly construed against the grantee. Nothing passes except what is conveyed in clear language. Doubts are resolved in favor of the United States. See, *e.g.*, *United States v. Union Pacific R. Co.*, 353 U.S. 112, 116 (1956); *United States v. Wyoming*, 331 U.S. 400 (1947).

waters that are under their jurisdiction, made this declaration: "Although this power of changing the common law rule as to streams within its domain undoubtedly belongs to each State, yet two limitations must be recognized: First, that in the absence of specific authority from Congress a State cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the Government property." *United States v. Rio Grande Irrigation Co.*, 174 U.S. 690, 703 (1899). The Court rejected the contention there made that the diversion in question was authorized by the Act of 1866 and the Desert Land Act. Referring to a later statute prohibiting obstructions to navigation without the consent of Congress (Act of September 19, 1890, 26 Stat. 454 § 10), the Court said at page 707: "As this is a later declaration of Congress, so far as it modifies any privileges or rights conferred by prior statutes it must be held controlling, at least as to any rights attempted to be created since its passage; and all the proceedings of the appellees in this case were subsequent to this act."

In *Winters v. United States*, 207 U.S. 564 (1908), the United States sued to restrain Winters and others from obstructing the flow of a non-navigable stream to an Indian reservation. The reservation had been established in 1888, subsequent to the Acts of 1866, 1870 and the Desert Land Act. Nonetheless, citing the *Rio Grande* case, *supra*, the Court held against Winters, saying, at page 577, "* * * The power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be."

The conclusions reached in these cases, as well as in *Federal Power Commission v. Oregon, supra*, p. 66,²⁷ would not have been possible if the Desert Land Act or either of the earlier acts had conveyed title to, or irrevocably surrendered control of, the unappropriated, non-navigable waters on the public lands to the states. Such a transfer would have constituted a *fait accompli*. Subsequent United States action, either in direct legislation or by way of reservation, would have been ineffectual. The Government, obviously, could not have reserved or withdrawn something it no longer had.

Appellant relies heavily on *California Oregon Power Company v. Beaver Portland Cement Company*, 295 U.S. 142 (1935). That decision does not support her contentions. Instead, it fully supports the position asserted here by the United States.

The first thing to note about that case is that it pertained to "public lands," not reserved lands of the character here involved. The Court was speaking of "public lands" when it said: "* * * The fair construction of * * * [the Desert Land Act of 1877] is that Congress intended to establish the rule that for the future the land should be patented separately; and that all non-navigable waters thereon should be reserved for the use of *the public* under the laws of the states and territories named. The words that the water of all sources of water supply upon the public lands and not navigable 'shall remain and be held free for the appropriation and use of the public' are not susceptible of any other construction." (Emphasis supplied.) 295 U.S. 162. Nothing in this statement reveals any basis to conclude that the United States has relinquished all

²⁷ And see *United States v. Conrad Investment Company*, 161 Fed. 629 (C.A. 9, 1908).

rights in non-navigable waters upon or beneath the surface of its *reserved* land. On the contrary, the Court, in describing the policy that Congress had in mind as being "to further the disposition and settlement of the public domain," (295 U.S. 161), makes clear the limitation of the acts of Congress to *public lands* open to private entry and for which patents could be issued.

But even as to "public lands," the Court did not announce that the United States had ceded full title or control of the waters to the States. Rather, the decision declared that subsequent to the Desert Land Act the public lands would be patented separately from waters on those lands. Title to the lands and to the rights to the use of water remained in the United States until there had been fulfillment of the conditions imposed by Congress for their acquisition. Kinney on Irrigation and Water Rights, Vol. 1, 2d Ed., Sec. 411, pp. 692-3.

Whatever question might otherwise exist as to the somewhat ambiguous language of isolated sentences of the opinion in that case, the Supreme Court itself has made clear its meaning when it said in *Federal Power Commission v. Oregon*, *supra*, p. 66, 349 U.S. at 447-448:

The purpose of the Acts of 1866 and 1870 was governmental recognition and sanction of *possessory rights* on public lands asserted under local laws and customs. *Jennison v. Kirk*, 98 U.S. 453. The Desert Land Act severed, *for purposes of private acquisition*, soil and water rights on public lands, and provided that *such water rights* were to be acquired in the manner provided by the law of the State of location. *California Oregon Power Co.*

v. Beaver Portland Cement Co., 295 U. S. 142. See also, *Nebraska v. Wyoming*, 325 U.S. 589, 611-616. [Emphasis supplied.]

It is true that in *Power Co. v. Cement Co.* the Court said that after 1877 "all nonnavigable waters then a part of the public domain became *publici juris*, subject to the plenary control of the designated states, * * * with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain." 295 U.S. at 163-164. Nothing in this statement militates against the foregoing summarization of the holding. "Plenary control" by the States of the manner in which the *public* could acquire *from the United States rights* to the use of water upon public land is not a recognition of any transfer of the title to those rights to the States. Neither does the Court's language mean that Congress has invested the States with "plenary control" over the use by the United States of its own properties in the performance of its constitutional functions.

So interpreted, the 1877 Act has a direct parallel in the mining laws which stem from the same precursor Acts of 1866 and 1870.²⁸ State and local mining laws were adopted by Congress as subsidiary regulations to govern the disposition of government mineral property to locators. See *Butte City Water Co. v. Baker*, 196 U.S. 119 (1905). The Court there recognized that the United States retained title to the minerals not privately acquired under the statutes and that Congress

²⁸ Section 1 of the 1866 Act even contained a mineral counterpart to the general "public use" provision of the 1877 Act as to water: "That the mineral lands of the public domain * * * are hereby declared to be free and open to exploration and occupation by all citizens of the United States * * *."

retained its full measure of constitutional control over their disposition. Similarly, in the case of unappropriated rights to the use of water, under the Desert Land Act the United States retains its full measure of constitutional control over the disposition of them.

Ickes v. Fox, 300 U.S. 82 (1937), cited on pp. 21 and 33 of appellant's opening brief, has nothing to do with the problem here. It will be observed the Court did nothing but describe briefly the holding in *Beaver Portland*. And that we have explained above. The question before the Court was whether in that suit against the Secretary of the Interior the United States was an indispensable party. The relief sought was an injunction against requiring plaintiffs, landowners within an established reclamation project, to pay a part of the cost of additional storage which was being constructed for the service of new lands and was not necessary to serve the lands of the original project as a condition to receiving the full quantity of water necessary for irrigation of their lands. Plaintiffs alleged that they owned paid up rights under the project to such quantity of water and that those rights were appurtenant to their lands. This allegation of title in plaintiffs was not controverted. The case went up by special appeal from an order denying the Secretary's motion to dismiss. The Court noted, 300 U.S. 96, that the motion to dismiss conceded the truth of plaintiff's allegation of title. There was no consideration of the ownership of rights to use the unappropriated waters on reserved lands or on public lands. There was not even a disputed question of ownership of rights to use the project waters as between the United States and the project landowners. Had there been, we assume the case would have been decided with reference to § 8 of the Reclama-

tion Act of 1902 and other provisions of reclamation law which would have been applicable. But the questions before this Court in this case would not have been settled.²⁹

There can be no other rational interpretation of the Desert Land Act than the one for which we contend. It would be to accuse Congress of emasculating its own legislation to say that by the Desert Land Act control or ownership of the non-navigable waters on the public lands was irrevocably surrendered to the states. This is because such action by Congress would mean that it had split off a segment of its property that was *indispensable* to the implementation of its land disposition policy. One property interest was necessary to the vesting of rights in the other, under the requirements of the Desert Land Act.

It must be remembered, of course, that the Desert Land Act was an arid-land adaptation of Congress' land disposition and settlement policy.³⁰ The act was devised as a way by which title to *both* land and the use of water could be acquired so that the lands in the designated desert land states could be settled—just as other areas were and have been settled under the homestead and pre-emption laws. The act authorized the disposal of *lands*, conditioned upon reclamation by ir-

²⁹ It should be noted that *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682 (1949), casts considerable doubt on the holding in *Ickes v. Fox* that the suit there was not in effect against the United States. However, this doubt relates to whether the tortious character of an officer's conduct is sufficient to make that conduct unlawful so that a suit to restrain such conduct is not in effect a suit against the United States. It has nothing to do with the ownership or control of the unappropriated waters on the reserved and public lands of the United States.

³⁰ See *California Oregon Power Co. v. Beaver Portland Cement Co.*, *supra*, 295 U.S. at 157, 161.

rigation. Water was only incidental, albeit necessary, to the disposal of the public lands involved. The primary purpose, then, was to facilitate the disposal and settlement by the public of the public *lands* in the desert land states, not disposal of the waters of and by themselves.

If Congress had transferred ownership or irrevocably surrendered control of the unappropriated non-navigable waters to the states, it would mean that the United States' public land policy in the desert land states would exist entirely at the mercy of the states. A State, for example, might decide that it would use all of the waters within its borders for industrial uses, rather than land reclamation and settlement purposes. And the main purpose of the Desert Land Act would be thereby completely frustrated.

To thus risk the creation of a vast desert-like "white elephant," we strenuously maintain, is exactly the opposite of what Congress intended by the Desert Land Act.

Moreover, we submit that Congress did not intend the Desert Land Act to apply to percolating waters. This would seem to be true merely from consideration of the fact that such waters are generally held to be inseparable from the soil itself. *Supra*, pp. 57-61. Further, so far as we have determined, such waters were not subject to appropriation under the laws of any of the States in 1877. (Nevada, as before noted, expressly excluded them from her appropriation laws until 1939.) And the express language of the act refers only to "lakes, rivers, and other sources of water supply *upon* the public lands *and not navigable*." In discussions in the pertinent legislative history indicat-

ing the nature of the water sources under consideration, only surface waters were referred to. (Congressional Record, 44th Cong., 2d Sess., pp. 1966, 1967, 1968.) The words "and not navigable," we suggest further, have significance in their attempted distinction and limitation only with regard to surface waters.

But even should the Court be persuaded to the view that the act does apply to such underground waters it is plain that Congress has not regarded the act an irrevocable transfer of title or surrender of the power to control such water to the States. For by the Act of October 22, 1919 (41 Stat. 293, 43 U.S.C. §§ 341-360), Congress provided a system for the exploration for and development of underground waters "beneath the surface" of the public lands within the State of Nevada under permit granted by the Secretary of the Interior. That act is still in full force. Beyond any question, it places in the Secretary of the Interior full and complete jurisdiction with respect to the development and use of the underground waters beneath the surface of the "unreserved * * * public lands of the United States within the State of Nevada * * *."³¹

³¹ And see Sec. 10 of the Act of December 29, 1916 (39 Stat. 865, 43 U.S.C. 600) as evidence that Congress has not considered that it has transferred to the States the ownership of unappropriated waters on or under United States' lands. That section authorized reserving areas containing springs or water holes. See also Act of June 4, 1897, c. 2, 30 Stat. 36, 16 U.S.C. 481; Act of June 11, 1906, c. 3074, sec. 3, 34 Stat. 234, 16 U.S.C. 508; Act of June 25, 1910, c. 421, 36 Stat. 847, 43 U.S.C. 141, 142; and the Federal Power Act of June 10, 1920, 41 Stat. 1063. These statutes, enacted after 1877, exercise control over nonnavigable waters on the public domain.

5. *There having been no grant by the United States to the State of Nevada of title to the right to use the unappropriated ground waters within the Hawthorne Naval Ammunition Depot, the ownership thereof continues in the United States free of any authority in the State of Nevada to control their use by the United States.*

Inasmuch as title to the unappropriated waters pertaining to the lands of the United States has not been transferred to the States, it follows that Nevada's claim of power to control the use of the underground waters within the Hawthorne Naval Ammunition Depot based on her asserted ownership of those waters is wholly unsupportable.³² The inescapable corollary of this is that title thus continues in the United States, in whom it vested in 1848. See *Winters v. United States*, *supra*, pp. 67 and 70; *Howell v. Johnson*, 89 Fed. 556, 558, 559 (C.C.D. Mont., 1898), cited with approval in *California Oregon Power Company v. Beaver Portland Cement Co.*; *Hough v. Porter*, *supra*, footnote 25; *Nevada Ditch Co. v. Bennett*, 30 Ore. 59, 103, 104, 45 Pac. 472, 484 (1896); *Lux v. Haggin*, 69 Cal. 255, 338-339, 4 Pac. 919 (1884), 10 Pac. 674 (1886); *Duckworth v. Watsonville Water & Light Co.*, 150 Cal. 520, 531, 89 Pac. 338 (1907); and *San Bernardino v. Riverside*, *supra*, p. 59; *United States v. Conrad Investment Company*, *supra*, footnote 27; *United States v. McIntire*, 101 F. 2d 650 (C.A. 9, 1939); *United States v. Walker River Irriga-*

³² Surely the contention that by the declaration of her legislature of public ownership of the waters within the State, Nevada acquired either an ownership of or power to control the waters in question is without merit. What the State did not have, she could not acquire by *ipse dixit*, such as this. *San Bernardino v. Riverside*, *supra*, p. 59; Kinney, *infra*, footnote 33.

tion District, 104 F. 2d 334 (C.A. 9, 1939); *United States v. Ahtanum Irrigation District et al.*, 236 F. 2d 321 (C.A. 9, 1956), *cert. denied*, 352 U.S. 988.³³ It is therefore indisputable that the appellant's claim of power to control and prohibit the use of those waters by the United States cannot be sustained on *any* basis. For, as we have pointed out earlier, if one thing is plain in constitutional law it is that the States cannot prohibit, control or regulate the use by the United States of its own property. *A fortiori*, a State cannot do so when such property is located outside the area of the State's legislative jurisdiction (*supra*, pp. 43-49), or when the effect of such regulation might be completely to frustrate the performance by the United States of their constitutional functions (*supra*, pp. 49-57).

³³ Kinney, based on an impressive body of decisions (Kinney on Irrigation and Water Rights, Vol. 1, 2d ed., sec. 411, pp. 692-3), concludes that title to the unappropriated rights to the use of water resides in the United States:

The Government is still the owner of the surplus of the waters flowing upon the public domain or rather the owner of all the waters flowing thereon remaining after deducting the rights to the use of the same which have vested in and accrued in some legal way to individuals and companies. * * *

It therefore follows, as the result of the ownership by the United States of the waters flowing upon the public domain, that any dedication by a State of all the waters flowing within its boundaries to the State or to the public amounts to but little, in the face of any claim which may be made by the Government, *at least* to all the surplus or unused waters within such State. * * *

C. *Section 666, 43 U.S.C., does not support appellant's argument that even though the United States owns under Federal law rights to the use of water, it shall be deemed to have waived those rights whenever a suit purportedly under authority of the statute is initiated.*

Appellant argues that the effect of the second sentence of paragraph (a) of Section 666, *supra*, p. 3, is to require that even though the United States owns rights to the use of water under Federal law, whenever suit is brought under purported authority of that statute those rights may not be asserted except as recognized under the law of the State wherein the water is applied to use. Therefore, she says, since this is purportedly a suit under § 666 and the United States has not obtained a permit from the State Engineer of Nevada to use the waters in question, the United States may not assert its rights independent of the law of the State and the use should be declared illegal. A more transparently "boot strap" argument would be hard to invent.

We have shown that because there is presented no question of conflict with the rights of other water users, there is no justiciable controversy and the questions presented here are not appropriate for judicial settlement. *Supra*, pp. 12-22. We have shown that § 666 cannot be construed as attempting to authorize exercise of the judicial power to resolve a controversy such as this, and that if it were so construed, there would be serious doubt as to the statute's validity. *Supra*, pp. 33-35. We have shown at length the other reasons why § 666 cannot be construed as granting consent to suits such as this, *supra*, pp. 22-43, and that if the statute

were interpreted as authorizing this suit, there would be additional questions of constitutionality. *Supra*, pp. 41-43.

In addition, we have shown that the laws of Nevada are without effect within the Hawthorne Naval Ammunition Depot simply because that area is beyond the reach of the State's legislative power. *Supra*, pp. 43-49. We have also shown that there are constitutional obstacles to the enforcement of any law, State or Federal, the effect of which would be to require that the United States conduct its activities which are essential to the performance of its constitutional functions in the interest of National Defense only as and if permitted by the several States. *Supra*, pp. 49-57.

It is only if we are wrong on each and every one of these points that consideration need be given to the appellant's contention last above noted. But only brief consideration of the contention will demonstrate its invalidity.

Section 666 is not a substantive law. Its purpose was solely to remove the sovereign immunity of the United States from suits for the adjudication or administration of rights to use the waters of a river system or other source, simply because without such waiver of immunity it was impossible in many areas of the West to obtain a final adjudication. The language of the statute makes this clear. The exchange of correspondence between Senators Magnuson and McCarran, "made a part of" Senate Report No. 755 (Appendix A) makes it clear. The whole body of the rest of the report makes it clear. "Congress has not removed the bar of immunity even in its own courts in suits wherein water rights acquired under State law are drawn in question. The bill (S. 18) was introduced for the very

purpose of correcting this situation and the evils growing out of such immunity." Appendix A, pp. 86-87.

When Congress said that the United States, when a party to "any *such* suit"—that is, one authorized under the first sentence of paragraph (a)—shall "be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty," it simply meant that, as a corollary of the consent to be sued, the United States should not assert that *applicable* State laws are inapplicable to the United States because of the sovereignty of the United States.³⁴ This is a far cry from stating the conclusion for which appellant contends. Congress did not say when the United States is joined in any suit purportedly brought under authority of § 666, Art. VI, Cl. 2, of the Constitution of the United States should be inapplicable—or that no constitutional function of the United States requiring the use of water might be performed unless such use was authorized by State authorities—or that Federally-owned rights to the use of water not dependent upon State law might be exercised only if permitted by State authorities—or that all areas over which legislative jurisdiction had been ceded to the United States should be deemed to have been retroceded.

Congress does not—and we doubt that it could if it attempted to—dispose of the properties of the United

³⁴ The District Court commented on this language of the statute in this fashion: "This does not mean, however, that the United States cannot invoke Federal statutes and decisions in support of its claim that it need not obtain a permit from the State to use underground waters in a naval installation. This Court does not believe that the defendant stultified itself by giving its case away in advance: All laws, both State and Federal, are to be considered in this case, *insofar as they are relevant*." [Emphasis supplied.] R. 65-66; 165 F. Supp. 604.

States³⁵ or of its constitutional rights and powers by such ambiguous means as this. Surely this is true when the language which it is said constitutes a wholesale abandonment of water rights owned by the United States and of the power to control Federal water-using activities is no more than an explanatory statement in a statute “not intended to be used for any other purpose than to allow the United States to be joined in a suit wherein it is necessary to adjudicate *all* of the rights of various owners on a given stream.”³⁶

The foregoing demonstrates the fallacy of appellant’s contention. Attention to some of the consequences which would follow from upholding that contention is further demonstrative of its weakness.

Admittedly, the United States is engaged in many water-using activities throughout the Nation, its rights to the use of water in which have not been acquired in accordance with the laws of the States relative to the appropriation, control, use and distribution of water. Is it contended that if the United States, as plaintiff, brings suit for adjudication of the rights to use the waters involved in any of those projects it may assert its rights not dependent upon State law, but if someone else wins the race to the Court House and starts suit under § 666 those rights are abandoned?

In two recent cases (*Anderson v. Seeman et al.*, 252 F. 2d 321 (1958), *cert. denied* 358 U.S. 820; *Neches River Conservation District v. Seeman*, 252 F. 2d 327 (1958), *cert. denied* 358 U.S. 820), the Fifth Circuit

³⁵ See footnote 26, *supra*.

³⁶ Attention should be invited also to the fact that enactment of the statute was accomplished by its attachment as a rider to an appropriation bill. And see paragraph (d) of the rider, and the comment of this Court with respect thereto in *Santa Margarita Mutual Water Company v. United States*, 235 F. 2d 647, 653 (1956).

Court of Appeals held that the Rivers and Harbors Act of 1945 does not require the acquisition of a permit from the Texas State Board of Water Engineers for the construction of a Federal dam authorized by that Act, and that the Texas law requiring that such a permit be obtained was not applicable. Those suits were brought, not against the United States, but against the officers in charge of the project. Would this Court be inclined to the view that all the plaintiffs in those cases need do in order to obtain the relief they wish is to bring suit against the United States under purported authority of § 666?

Would the Court be disposed to hold that in a suit purportedly under authority of § 666 the construction of Hoover Dam could have ^{been} enjoined because the United States did not have a permit from the State of Arizona? Cf. *Arizona v. California*, 283 U.S. 423. It could not be so, because the very point was made in the correspondence between Senators Magnuson and McCarran that the proposed legislation was not meant to obstruct such projects. Appendix A, pp. 87-90.

In the pending case of *Arizona v. California*, No. 9 Original in the Supreme Court of the United States, there are at issue the rights of the United States to use water on some twenty-six Indian reservations. Would it be reasonable to conclude that in that litigation the United States, a party to the case by intervention, may prove such rights as it has with respect to those reservations under the doctrine of *Winters v. United States*, *supra*, p. 70, but that in other litigation brought under authority of § 666 those rights, which are not dependent upon the laws of the States, shall be deemed abandoned?

~~It is~~ reasonable to suppose that Congress intended by
is it

§ 666 to abandon all of the reserved rights to use water which it holds for Indians and Indian tribes?

Can it be supposed Congress intended that when suit is brought under purported authority of § 666 no cession of legislative jurisdiction by a State to the United States shall be applicable but that the same cession shall continue in effect for all other purposes?

We believe that each of these questions must obviously be answered against Nevada's contention that § 666 does something more than waive the United States' sovereign immunity in a proper suit under authority of that section. Accordingly, we submit there is nothing in the statute which in any way affects the substantive law here applicable even if the Court should consider that the statute applies to a case such as this.

CONCLUSION

It is respectfully submitted that appellant's complaint should have been dismissed for lack of jurisdiction, and that in the alternative judgment for the appellee should be affirmed.

Respectfully submitted,

PERRY W. MORTON,
Assistant Attorney General.

HOWARD W. BABCOCK,
United States Attorney.

DAVID R. WARNER,

CHARLES G. LUELLMAN,
Attorneys, Department of Justice.

APPENDIX A

The following excerpts from Senate Report No. 755, 82nd Congress, 1st Session, are particularly pertinent to the questions of interpretation of Section 666, 43 U.S.C., discussed in the brief.

Pages 4 and 5:

It is most clear that where water rights have been adjudicated by a court and its final decree entered, or where such rights are in the course of adjudication by a court, the court adjudicating or having adjudicated such rights is the court possessing the jurisdiction to enter its orders and decrees with respect thereto and thereafter to enforce the same by appropriate proceedings. In the administration of and the adjudication of water rights under State laws the State courts are vested with the jurisdiction necessary for the proper and efficient disposition thereof, and by reason of the interlocking of adjudicated rights on any stream system, any order or action affecting one right affects all such rights. Accordingly all water users on a stream, in practically every case, are interested and necessary parties to any court proceedings. It is apparent that if any water user claiming to hold such right by reason of the ownership thereof by the United States or any of its departments is permitted to claim immunity from suit in, or orders of, a State court, such claims could materially interfere with the lawful and equitable use of water for beneficial use by the other water users who are amenable to and bound by the decrees and orders of the State courts. Unless Congress has removed such immunity by statutory enactment, the bar of immunity from suit still remains and any judgment or decree of the State court is ineffective as to the water right held by the United States. Con-

gress has not removed the bar of immunity even in its own courts in suits wherein water rights acquired under State law are drawn in question. The bill (S. 18) was introduced for the very purpose of correcting this situation and the evils growing out of such immunity.

Page 6:

The committee is of the opinion that there is no valid reason why the United States should not be required to join in a proceeding when it is a necessary party and to be required to abide by the decisions of the Court in the same manner as if it were a private individual.

Senator Magnuson raised the question as to whether S. 18 could be used for the purpose of delaying or blocking a multiple-purpose development such as proposed for the Hells Canyon project on the Snake River in the Columbia Basin or other similar projects, stating that there was a possibility of an individual or group having water rights on that stream bringing suits to adjudicate their respective rights and therefore preventing the Bureau of Reclamation from going ahead with the Hells Canyon project while litigation is in process or pending. The committee, for the legislative history of this bill, definitely desires to repudiate any such intent which may be deduced from S. 18 and states that this is not the purpose and the intent of this legislation. Where reclamation projects have been authorized for the benefit of the water users and the public generally, they should proceed under the law as it exists at the present time and should the Government have reason to need the water of any particular user on a stream, that water should be obtained by condemnation proceedings as is already provided for by law.

The committee can think of no particular reason why the mere development of a project should be delayed or stopped by the passage of S. 18 and it is not so intended. An exchange of letters by Senator Magnuson and Senator McCarran dealing with this feature of the bill is hereto attached and made a part of this report.

Pages 9 and 10:

August 24, 1951.

Re S. 18.

Hon. Pat McCarran,
Chairman, Committee on the Judiciary,
United States Senate.

DEAR SENATOR: I am in agreement with the general purposes of S. 18. However, there is one possible implication in the bill that has caused me some apprehension and I take this means of achieving clarification before final action by our committee occurs.

It appears to me that section 1 of the bill—although I am sure that is not the intent—might make it possible to block or delay a multiple-purpose development, such as proposed for the Hells Canyon project on the Snake River in the Columbia Basin.

I visualize the possibility of an individual or group, having water rights on that stream, bringing suit to adjudicate their respective rights—thereby preventing the Bureau of Reclamation from going ahead with the Hells Canyon project while litigation is in process or pending. Such action on the part of appropriators might be taken on their own initiative or might be stimulated by third parties who have been opposing this development.

A similar set of circumstances might prevail with respect to other streams in the Basin. I will appreciate the benefit of your best judgment as to whether

S. 18 could be used in the manner I have described. I think clarification on this point will be extremely useful if made a part of the legislative history of this bill.

* * * * *

Sincerely,

WARREN G. MAGNUSON,
U. S. S.

August 25, 1951.

Hon. Warren G. Magnuson,
United States Senate, Washington, D. C.

MY DEAR SENATOR MAGNUSON: I was very pleased to receive your letter of August 24, 1951, relative to S. 18, which provides for the joining of the United States in suits involving water rights where the United States has acquired or is in the process of acquiring water rights on a stream and is a necessary party to the suit.

I note that you raise the question that it might be possible to block or delay a multiple-purpose development, such as proposed for the Hells Canyon project on the Snake River in the Columbia Basin. You indicate that you visualize the possibility of an individual or group, having water rights on that stream, bringing suit to adjudicate their respective rights thereby preventing the Bureau of Reclamation from going ahead with the Hells Canyon project while litigation is in process or pending.

S. 18 is not intended to be used for the purpose of obstructing the project of which you speak or any similar project and it is not intended to be used for any other purpose than to allow the United States to be joined in a suit wherein it is necessary to adjudicate all of the rights of various owners on a given stream. This is so because unless all of the parties

owning or in the process of acquiring water rights on a particular stream can be joined as parties defendant, any subsequent decree would be of little value. I agree with you that for purposes of legislative history, the report should show that S. 18 is not intended to be used for the purpose of obstructing or delaying Bureau of Reclamation projects for the good of the public and water users by the method of which you speak and in that connection I propose that such a statement be incorporated in the report and that this exchange of letters be attached thereto.

* * * * *

Sincerely,

PAT McCARRAN,
Chairman.

Constitution of the United States—

Art. IV, Sec. 3, Cl. 2:

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States;

Art. VI, Cl. 2:

This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Art. I, Sec. 8:

The Congress shall have Power To * * * provide for the common Defence * * * ; (Cl. 1)

To make Rules for the Government and Regulation of the land and naval Forces; (Cl. 14)

Section 9 of the Act of July 26, 1866, 14 Stat. 251, 253, 30 U.S.C. 51, 43 U.S.C. 661:

Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same;

Section 7 of the Act of July 9, 1870, 16 Stat. 217, 218, 43 U.S.C. 661:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the act granting the right of way to ditch and canal owners over the public lands, and for other purposes, approved July twenty-six, eighteen hundred and sixty-six, be, and the same is hereby amended by adding thereto the following additional sections, numbered twelve, thirteen, fourteen, fifteen, sixteen, and seventeen, respectively, which shall hereafter constitute and form a part of the aforesaid act.

*

*

*

*

*

Sec. 17. *And be it further enacted,* That none of the rights conferred by sections five, eight, and nine of the act to which this act is amendatory shall be abrogated by this act, and the same are hereby extended to all public lands affected by this act; and all patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the ninth section of the act of which this act is amendatory. * * *

Section 1 of the Desert Land Act of 1877, 19 Stat. 377, 43 U.S.C. 321:

It shall be lawful for any citizen of the United States, * * * to file a declaration * * * that he intends to reclaim a tract of desert land * * * by conducting water upon the same, within the period of three years thereafter: *Provided, however,* That the right to the use of water by the person so conducting the same, on or to any tract of desert land * * * shall depend upon bona fide prior appropriation; and such right shall not exceed the amount of water actually appro-

priated, and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the *public lands* and not navigable, *shall remain and be held free for the appropriation and use of the public* for irrigation, mining, and manufacturing purposes subject to existing rights. * * * [Emphasis supplied.]

Act of March 21, 1864, 13 Stat. 30 [Nevada Enabling Act]:

Sec. 4. * * * That said convention shall provide, by an ordinance irrevocable, without the consent of the United States and the people of said state:—

* * * * *

Third. That the people inhabiting said territory do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within said territory, and that the same shall be and remain at the sole and entire disposition of the United States; * * *

Nevada Constitution, Nevada Compiled Laws, 1929, Section 20, Nevada Revised Statutes, Vol. 5, Constitution [Preliminary Action]:

* * * * *

§ 3. In obedience to the requirements of an act of the Congress of the United States approved March twenty-first, A. D. eighteen hundred and sixty-four, to enable the people of Nevada to form a constitution and state government, this convention, elected and convened in obedience to said enabling act, do ordain as follows, and this ordinance shall be irrevocable

cable, without the consent of the United States and the people of the State of Nevada:

* * * * *

Third—That the people inhabiting said territory do agree, and declare, that they forever disclaim all right and title to the unappropriated public lands lying within said territory, and that the same shall be and remain at the sole and entire disposition of the United States; * * *

Act of March 28, 1935, Ch. 144, Statutes of Nevada, 1935:

The People of the State of Nevada, represented in Senate and Assembly, do enact as follows:

Section 1. The State of Nevada, except as hereinafter reserved and provided, hereby cedes jurisdiction to the United States upon and over the land and within the premises of that certain area situated near Hawthorne, Nevada, in Mineral County, commonly known as the "U. S. N. Ammunition Depot," comprising all of that certain area now occupied by the federal government in connection with said plant, or to be hereafter acquired or annexed thereto, or to be used in connection therewith, including all the buildings and improvements thereon.

Sec. 2. It is hereby reserved and provided by the State of Nevada that any private property upon said lands or premises shall be subject to taxation by the state, or any subdivision thereof having the right to levy and collect such taxes, but any property upon or within such premises which belongs to the government of the United States shall be free of taxation by the state, by the county of Mineral, or any of its subdivisions.

Sec. 3. The State of Nevada reserves the right to serve or cause to be served, by any of its proper officers, any criminal or civil process upon such land or within such premises for any cause there or elsewhere in the state arising, where such cause comes properly under the jurisdiction of the laws of this state or any subdivision thereof.

Sec. 4. This act shall be in full force and effect from and after its passage and approval.

Sec. 84, Ch. 140, Nevada Statutes, 1913, § 7970, Nevada Compiled Laws, 1929, Nevada Revised Statutes § 533.-085 Vested rights to water not impaired.

1. Nothing contained in this chapter shall impair the vested right of any person to the use of water nor shall the right of any person to take and use water be impaired or affected by any of the provisions of this chapter where appropriations have been initiated in accordance with law prior to March 22, 1913.

* * * * *

Act of March 24, 1915, Ch. 210, Nevada Statutes, 1915, § 7987, Nevada Compiled Laws, 1929:

§ 1. All underground waters save and except percolating water, the course and boundaries of which are incapable of determination, are hereby declared to be subject to appropriation under the laws of the state relating to appropriation and use of water.

United States Court of Appeals

FOR THE

Ninth Circuit

THE STATE OF NEVADA, EX REL. HUGH A.
SHAMBERGER, STATE ENGINEER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPELLANT'S REPLY BRIEF

ROGER D. FOLEY,
Attorney General
Carson City, Nevada

W. T. MATHEWS,
Special Assistant Attorney General
331 Gazette Building
Reno, Nevada

FRANK H. SCHMID, CLERK WILLIAM N. DUNSEATH,
Special Assistant Attorney General
Clay Peters Building
Reno, Nevada
Counsel for Appellant.

FILED

JAN 15 1960

January 18, 1960.



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W. T. MATHEWS,
Special Assistant Attorney General
331 Gazette Building
Reno, Nevada

WILLIAM N. DUNSEATH,
Special Assistant Attorney General
Clay Peters Building
Reno, Nevada
Counsel for Appellant.

January 18, 1960.

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No. 16389

United States Court of Appeals

FOR THE

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THE STATE OF NEVADA, EX REL. HUGH A.
SHAMBERGER, STATE ENGINEER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPELLANT'S REPLY BRIEF

STATEMENT RE ISSUES

The Appellee in its answering brief herein rests its case upon the sovereignty of the United States, maintaining that no suit for declaratory judgment will lie under the Consent to Suit Act and by reason thereof the Court had no jurisdiction. The Lower Court, however, did assume and retain jurisdiction and rendered a declaratory judgment in favor of the Appellee and pursuant to such declaration dismissed the suit.

As pointed out in Appellant's opening brief, page 39 et seq., the opinion of the Lower Court discloses a meager interpretation of the Consent to Suit Act, notwithstanding the language written into the Act by Congress that the United States shall be deemed to have waived any right to plead that it is not amenable to State

law by reason of its sovereignty, the Court premised its opinion and decision on such sovereignty.

The Appellant submits that the Court's interpretation of the Act was unduly restrictive and not consistent with the intent of Congress that sovereignty itself of the United States was not to be a bar to the application of the State water laws. It needs no citation of authority to show that it would indeed be a rare case in which the sovereign power of the United States could not be invoked.

The Appellant in perfecting its appeal herein is cognizant of the fact that the interpretation of the Act in question is of paramount importance. In effect, it is one if not in fact the major issue. It is a question dealing with the interpretation of an Act of Congress enacted pursuant to its constitutional power set forth in Article IV, Section 3, Clause 2 of the Constitution. This power of Congress is without limitation. *Alabama v. Texas*, 347 U. S. 372.

In *United States v. San Francisco*, 310 U.S. 16, the Court, referring to the Property Clause of the Constitution, said it "provides that The Congress shall have power to dispose of and make all needful rules and regulations respecting the Territory and *other property* belonging to the United States. The power over the public land thus intrusted to Congress is without limitation. And it is not for the courts to say how that trust shall be administered. That is for Congress to determine." (Italics supplied.)

The term "public lands" as construed in the Pelton Dam case is not determinative in every case relating to the property in lands or waters thereon owned or claimed by the United States. In fact all lands and other property is publicly owned and held in trust therefor by the United States Government. The people of

this Nation wrote into their Constitution and granted to the Congress the power to dispose of and make all needful rules and regulations respecting the public property. *Kansas v. Colorado*, 206 U. S. 46. The Act waiving immunity contains no provision limiting its effect to any land classification, public, reserved or otherwise.

JURISDICTION

The Appellant State of Nevada, plaintiff below, as *parens patriae* of its people and also of the Town of Hawthorne, County seat of Mineral County, believing that its sovereign rights to the control and use of the waters for beneficial consumptive use within its borders had been most seriously impugned by the United States, as alleged in its Complaint (R-1-19), sought to obtain a judicial interpretation of its rights as well as the rights of the United States and the effect thereon of the Consent to Suit Act and the Pelton Dam case, with the view that a judicial declaration of the rights of the respective parties could well serve to settle for the future the rights thereof.

It is submitted that a judicial interpretation of the Consent to Suit Act is necessary. It is thought by many authorities that the decision rendered in the Pelton Dam case is of far-reaching effect. However, it is submitted that Congress in said Act evidenced its intent that the historic policy of Federal noninterference with State water law should be the rule of decision, even as to the Federal Government.

The suit was commenced in the State Court pursuant to and based upon Section 9440, Nevada Compiled Laws, 1959 (NRS 30.030) and the Consent to Suit Act. R-1-17.

The Supreme Court of Nevada in *Kress v. Corey*, 65 Nev. 1, 189 Pac. 2d 352, construed the statute to open the door to

adjudication of innumerable complaints and controversies not theretofore open to judicial relief and permits Courts to vindicate challenged rights, clarify and stabilize unsettled legal relations and remove legal clouds which create insecurity and fear, and that to obtain a declaratory judgment, justiciable controversy must exist. This pronouncement of the Nevada Court squares with the views of the Supreme Court in *Aetna Life Ins. Co. v. Haworth*, 300 U. S. 227; *Maryland Casualty Co. v. Pacific Coal and Oil Co.*, 312 U. S. 270.

That there is a controversy between the parties, a sovereign controversy so to speak, is self-evident. Certainly the Federal Declaratory Judgment Act sanctions the declaration of the rights and other legal relations of any interested party. And "such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

At pages 12 et seq., of its brief, Appellee strenuously contends that the Lower Court had no jurisdiction of the United States or the subject matter of the action upon the main ground that the United States had not consented to be joined as a defendant in the instant suit which seeks a declaratory judgment, and upon the additional ground that no justiciable controversy is presented. The Appellee most earnestly so argued to the Lower Court, yet such Court retained jurisdiction and reached a decision declaring that the rights of the United States were paramount to those claimed by the State. In brief, a declaratory judgment was rendered in a matter of grave importance relative to the consumptive use of the waters of the Arid West.

The Federal Declaratory Judgment Act is an enabling Act conferring discretion on the Courts as to its use. *Public Service Com. v. Wycoff*, 344 U. S. 337. The extent to which declaratory judgment procedure is used in the Federal Courts to control

State action lies in the sound discretion of the Court. *Alabama State Federation of Labor v. McAdory*, 325 U. S. 450. The Lower Court certainly exercised its discretion.

The Appellee contends here that jurisdiction under Section 666 could not attach save all other interested parties were joined in the action. In brief, that only general adjudication suits were and are contemplated by the Act. Brief, pp. 27, 28, 81-84, McCarran Letter, Appendix 89. The same contention was submitted to the Lower Court. That Court, however, did not agree with such construction. To the contrary the Court was of the opinion that the section goes further, and posed the question whether "the State of Nevada and the United States be parties to a controversy concerning it solely between themselves." Counsel for defendant demurred to the Court's discussion of the question—maintaining their construction of the Act. The Court replied "the government has put it in issue by saying 'we have taken it by our inherent sovereign right.' Is there a judicial issue then between the two, the State's theory and the Government's theory for administration of that water?" Tr. January 14, 1957, pp. 52-56.

The record herein discloses that the suit was removed to the Federal District Court by the Appellee; that the Appellant moved to remand, which was denied; that Appellee answered the complaint so removed to the Federal Court after such removal; that Appellee's Motion for Summary Judgment was denied. Supp. R-109-112.

The Opinion of the Lower Court demonstrates that the Court determined there was a justiciable controversy between the United States and the State within the purview of Section 666 and that the Court possessed the jurisdiction thereunder to render a decision.

The truth of the matter is that the case in the Lower Court

resolved itself into a contested question of law between two sovereign entities. One sovereign in national affairs but whose property and property rights are subject to the will and control of the Congress. The other, endowed by law, custom and Federal recognition with the right to control the appropriation and use of the nonnavigable waters within its borders. Tr. January 14, 1957, p. 25 et seq.

Surely under the facts and circumstances of this case a declaration of the rights of the sovereign parties was and is well within the purview of the Declaratory Judgment Act and the law as developed thereunder, irrespective of whether the Town of Hawthorne was joined as a party. The State certainly was and is here as *parens patriae*. A doctrine the Appellee has encountered many times in *Arizona v. California et al.* No. 9 Original, Supreme Court of the United States.

In maintaining the jurisdiction of the Lower Court herein, the Appellant does not concede that the Court's interpretation of the law and the resulting overriding sovereignty of the Appellee is correct.

The Appellant has not here appealed from the Order denying remand and, of course, cannot and does not now raise the question. However, in view of the contention of the Appellee that Section 666 cannot be invoked save upon the joinder of all parties to water right adjudication proceedings *with the consequent jurisdiction thereof in the Federal Courts*, it is submitted that there is respectable authority to the contrary. The Court in *In re Green River Drainage Area*, 147 Fed. Supp. 127, District of Utah, after exhaustive examination of the case wherein all parties were joined, remanded the cause to the State Court.

*Congress in the Enactment of the Consent to Suit Act
Evidenced Its Intent That in the Interest of Comity Between*

the United States and the States the Historic Policy of Noninterference With State Water Laws Shall Be Binding Upon the Federal Government in the Appropriation to Its Beneficial Consumptive Use of the Nonnavigable Waters Within a State.

The Appellee, in its voluminous brief, goes far afield in the endeavor to escape the meaning and effect of the Consent to Suit Act, and then at page 81 admits the clear purpose of the Act by saying:

“Section 666 is not a substantive law. Its purpose was solely to remove the sovereign immunity of the United States from suits for the adjudication or administration of rights to use the waters of a river system or other source, simply because without such waiver of immunity it was impossible in many areas of the West to obtain a final adjudication. The language of the statute makes this clear.”

Whether Section 666 is a substantive law is debatable. In any event, at least, it creates and provides the right of a state, entity or individual to summon the United States in a judicial proceedings for the purpose of determining the valuable rights to the beneficial consumptive use of waters of any source.

The Appellant is in agreement that until the enactment of Section 666 “Congress has (had) not removed the bar of immunity even in its own courts in suits wherein water rights acquired under State law are (were) drawn in question” and that “bill (S 18) was introduced for the very purpose of correcting this situation and the evils growing out of such immunity.” Long ago the Supreme Court held that statutes granting consent to bring suit against the United States must be read “according to the natural and obvious import of the language, without resorting to subtle or forced construction for the purpose of either limiting

or exempting its operation," *Moore v. United States*, 249 U. S. 487. *Miller v. Robertson*, 266 U.S. 243; *Canadian Aviator, Ltd., v. United States*, 324 U.S. 222; *United States v. Aetna Casualty and Surety Co.*, 332 U.S. 366.

Appellant notes the argument of Appellee at pages 82-85 of its brief, the gist of which is that notwithstanding the explicit language of the Act, "The United States when a party to any such suit, shall be deemed to have waived any right to plead that the State laws are inapplicable, or that the United States is not amenable thereto by reason of its sovereignty," nevertheless it constitutes in effect a disposal of the properties of the United States and/or its constitutional powers by ambiguous means. In brief, while Section 666 provides that the United States shall be deemed to have waived any right to plead that the State laws are inapplicable, still the concomitant provision "or that the United States is not amenable thereto by reason of its sovereignty," is of non effect. If such interpretation of the Act is correct, it is submitted that the Act will have failed to carry out the intent of Congress to institute order in lieu of chaos in the appropriation and administration of the water rights of the Arid West.

Congress, in the enactment of Section 666, had in mind the interest of comity between the United States and the States consistent with the historic policy of the United States of Federal noninterference with State water law, a policy that had its inception more than ninety years ago and pursuant to which the great body of State water law in the Arid Western States has been premised and administered.

At pages 14 et seq., of its brief, Appellee contends that the State cannot exercise its police power over the waters in question, stating, inter alia, "Contrary to the implications of Appellant's opening brief (see particularly the Appendix thereto),

there is no law of the United State applicable here similar to Section 8 of the Reclamation Act of 1902 (43 U.S.C. 383) directing conformity to State law." The appellant dissents. Congress has recently enacted just such laws expressly applicable to a naval reservation, and reservations for national defense purposes.

That Congress consistently relied and relies upon the historic policy of Federal noninterference with State water law is most aptly shown in *United States v. Fallbrook Public Utility District*, 165 Fed. Supp. 806, decided August 5, 1958, citing numerous Federal Acts so providing in Note 1, pages 841-842, and also directing attention to the Federal Act of July 28, 1954, 68 Stat. 577, relating to the DeLuz Dam on the Santa Margarita River for the use of the Department of the Navy in connection with a naval reservation known as Camp Pendleton. Section 2(a) of the Act provides:

"In the interest of comity between the United States of America and the State of California and consistent with the historic policy of the United States of America of Federal noninterference with State water law, the Secretary of the Navy shall promptly comply with the procedures for the acquisition of appropriative water rights required under the laws of the State of California as soon as he is satisfied, with the advice of the Attorney General of the United States, that such action will not adversely affect the rights of the United States of America under the laws of the State of California."

And in Section 3(c) it is provided:

"For the purposes of this Act the basis, measure, and limit of all rights of the United States of America pertaining to the use of water shall be the laws of the State of California * * *."

The same Court said at page 842, "Also particularly pertinent is Act of July 10, 1952, Ch. 651, Title 2, Sec. 208, 66 Stat. 560, 43 U.S.C.A. 666."

Congress in 1958 enacted "An Act to provide that withdrawals, reservations, or restrictions of more than five thousand acres of public lands of the United States for certain purposes shall not become effective until approved by Act of Congress, and for other purposes," approved February 28, 1958, 72 Stat. 27. This Act provides "except in time of war or national emergency hereafter declared by the President or the Congress, on and after the date of this Act, the provisions hereof shall apply to the withdrawal and reservation for, restriction of, and utilization by, the Department of Defense for defense purposes of the public lands of the United States * * *. Section 1.

Section 2 provides, inter alia, "No public land, water, or land and water, shall except by Act of Congress, hereafter be (1) withdrawn from settlement, location, or entry for use of the Department of Defense for defense purposes; (2) reserved for such use; or (3) restricted from operation of the mineral leasing provisions of the Outer Continental Shelf Lands Act, if such withdrawal, reservation, or restriction of more than five thousand acres in the aggregate for any one defense project or facility of the Department of Defense since the date of the enactment of this Act * * *."

Section 3 provides, inter alia, "Any application hereafter filed for withdrawal, reservation, or restriction, the approval of which will, under Section 2 of this Act, require an Act of Congress, shall specify—(8) if effecting the purpose for which the area is proposed to be withdrawn, reserved, or restricted, will involve the use of water in any State, whether, subject to existing rights under law, the intended using agency has acquired, or proposes to acquire, rights to the use thereof in conformity with State laws

and procedures relating to the control, appropriation, use and distribution of water.”

It is clear that the aforesaid Acts were enacted pursuant to the Property Clause of the Constitution and that Congress therein made certain that the well-established rule of Federal noninterference with State water laws should be strictly adhered to. Particularly is such admonition of Congress pertinent to the case at bar in view of the strenuous contention of the Appellee with respect to alleged State interference with national defense.

The issue of Federal noninterference with State water law received the earnest consideration in *United States v. Fallbrook Public Utility District*, herein above cited. The Court, in the course of its opinion, exhaustively analyzed every facet of the question. At page 846 the Court stated the conclusions to be drawn therefrom, i.e., that where Congress has intended the Federal Government or its agencies to take or use water rights, it has spoken expressly, but that no Act of Congress had specifically said that the United States, through an executive department, might take or use unappropriated waters on a military reservation in derogation of State laws. The Court then said, “We fail to see how Congress, by any of its actions, has so exercised the power vested in it under the Property Clause, to empower any Executive agency to use, take or appropriate unappropriated water for military reservations.” Most certainly the Court there invoked the historic policy of Federal noninterference with State water law.

It is submitted that the many years of the application of such historic policy, long sanctioned by the Congress, has laid the foundation broad and deep for the appropriation and use of the nonnavigable waters in accordance with the laws of the State and that the enactment of the Consent to Suit Act was for the very purpose of enforcing such policy.

THE POLICE POWER

The laws of the State of Nevada governing the right to appropriate to beneficial consumptive use the waters of the State were enacted under its police power for the conservation of its natural resources. Such power is well stated in 11 Am.Jur. 1034, Sec. 276:

“The state, in the exercise of its power to enact laws for the general welfare of its people, may enact laws designed to increase the industries of the state, to develop its resources, and to add to its wealth. The majority of the authorities, moreover, support the rule that not only adjoining land-owners, but the public at large, have an interest in the preservation of the natural resources of the country sufficient to justify appropriate legislation to prevent exploitation or waste of such resources by the owners of the land on which they are found. This rule finds specific expression in laws forbidding any waste of natural gas, oil, or mineral waters and subterranean flows and in laws forbidding the cutting of standing trees or the removal of stone, gravel, and sand from the seashore. The general rule applies to prevention of waste which would be detrimental to the public, as distinguished from an injury to an individual * * *.”

That Congress over the period of many years has been cognizant of the necessity of the conservation of water in the Arid West and that the appropriation to use and control thereof by law was of vital importance, not only to the economy of a particular State but also as a contribution to the welfare of the country as a whole.

It may well be that Congress long ago possessed, or even today possesses, the power to legislate with respect to the beneficial consumptive use of waters on the public lands or reservations to the exclusion of the States, but, it has not so legislated, to the contrary it has sanctioned the control of such waters by the States

and in numerous Acts has directed the officers and agents of the United States to comply with State law in the appropriation to beneficial consumptive use of its waters. In brief, Congress has not foreclosed the exercise of police power of the State where the right to the beneficial consumptive use of water is drawn in question.

It is submitted that the Consent to Suit Act, in effect, constitutes an assimilation of State water laws in all cases where the rights of the United States are drawn in question in the adjudication thereof, or for the administration of such rights, where it appears that the United States is the owner of or in the process of acquiring such rights by appropriation under State law by purchase, exchange or otherwise.

The Act in question is analogous to the Assimilative Crimes Act, 18 F.C.A. 13, making applicable to Federal enclave the criminal laws of the State in which the enclave was situated. This Act was construed in *United States v. Sharpnack*, 355 U.S. 286, and held constitutional. Inter alia, the Court said:

“Congress retains power to exclude a particular State law from the assimilative effect of the Act. This procedure is a practical accommodation of the mechanics of the legislative functions of the State and Nation in the field of police power where it is especially appropriate the Federal regulation of local conduct conform to that already established in the State.”

It is submitted that Congress undoubtedly was well advised and was of the opinion that the State water laws had long been the well-established regulation of the use of a most vital natural resource, and that in keeping with its historic policy has determined that it is especially appropriate that the regulation of Federal beneficial consumptive uses of water shall conform to the regulations already established in and by the State. And in so

legislating has not limited the application of the Act to waters situate on or in any classification of land, public, reserved or otherwise.

THE GROUND WATER EXPLORATORY ACT OF OCTOBER 22, 1919, 43 F.C.A. 351-360.

The Appellee, at page 68 et seq., of its brief, contends that the Desert Land Act does not transfer ownership of the unappropriated waters on public lands to the States. This contention, however, is not sustained by the historic policy over the period of many years that by statutory enactment and judicial interpretation the waters on such lands were subject to appropriation under the laws of the States where found.

The Exploratory Act, above cited, relates to desert land within Nevada and provides that the Secretary of the Interior may grant permits to citizens to prospect for ground water on areas of public land designated by the Secretary for disposal under said Act. If the citizen should develop water in accordance with the terms of the Act, a patent would be issued for one-fourth of the land designated in the permit. The Appellee points to this Act as placing the Secretary of the Interior in complete jurisdiction over the development of ground waters on unreserved public lands in Nevada.

The Appellant dissents. First, there is no evidence in this case that any person had acquired the right to so develop such water. Second, that since the 1939 ground water act of Nevada any such right when drawn in question would be subject to adjudication under Nevada law as to its standing as a valid right thereunder. Most certainly when such land passed into applicant's control the jurisdiction of the Secretary of the Interior ceased.

Lastly, in 1919 Nevada possessed no statutory law pertaining to percolating waters. In 1939 it did assume control thereover and required the appropriation thereof in accordance with its terms, a law which the officers of Appellee strictly complied with in the case at bar. R-7-15. A law that Congress has said shall not be deemed inapplicable by the United States when its rights are drawn in question.

CONCLUSION

With due respect to all and notwithstanding the contentions of the Appellee to the contrary as set forth in its brief, the Appellant respectfully submits that the legislative history of and the language in the Consent to Suit Act demonstrates that Congress intended that the historic policy of Federal noninterference with the State water laws should be the rule and not the exception.

The Act contains no exception to the application of its provisions to or on any lands of the United States or reservations thereof. In brief, Congress recognized the doctrine of the separation of the water from the land, i.e., the Colorado doctrine, and made it applicable to the appropriation of water by the United States wherever situate.

The record herein shows without contradiction that the United States was in the process of acquiring a water right by appropriation under State law, and in fact its officers had perfected such right and put the water to beneficial use in strict accord with such law. Then just before taking the final step in perfecting the title to the water right, i.e., the mere filing of proof of placing the water to beneficial use, refused to so file upon the authority of the Pelton Dam case, a decision construing a Federal statute

that contains an admonition of Congress that Federal noninterference with State water laws was still the policy of the law. Sec. 27, Fed. Power Act. This admonition was recognized by the Court in its opinion. It cannot well be claimed that the officers of the United States could have appropriated to beneficial consumptive use of the waters there upon the reservation of land theory without compliance with the State law. And since the enactment of the Consent to Suit Act it is submitted that any such rights so acquired, without such compliance, would be subject to attack by the State or other interested entity.

The Appellant respectfully submits, in the final analysis of the facts and circumstances herein, it is clear that the case has resolved itself into a justiciable controversy of law. A controversy that requires the judicial interpretation of the Consent to Suit Act and its effect on, and application to, the diametrical opposing theories of the Appellee and Appellant.

The Appellee's basic defense is the overriding sovereignty of the United States irrespective of the express language to the contrary in the Act. The Appellant relies upon the express intent of Congress that the United States when its rights are drawn in question according to the terms of the Act shall be deemed to have waived its right to plead the State laws are inapplicable and that it is not amenable thereto by reason of its sovereignty.

Congress may repeal the Act tomorrow. It may amend it in any respect. It may make it applicable to certain specified lands. But, until Congress does so amend it, it is submitted that the Act contains no language that limits its applicability to nonreserved lands. It is further submitted that Congress was well advised of the interlocking character of rights to the beneficial consumptive use of water of any source and intended that the rights of the United States were to be so treated.

The Appellant respectfully submits that the opinion and decision of the Lower Court, particularly as to the interpretation and effect of the Consent to Suit Act and the overriding sovereignty of the United States, was in error and that the judgment thereon should be reversed.

Respectfully submitted,

ROGER D. FOLEY,
Attorney General

W. T. MATHEWS,
Special Assistant Attorney General

WILLIAM N. DUNSEATH,
Special Assistant Attorney General

No. 16390

**United States
Court of Appeals**
for the Ninth Circuit

WICKAHONEY SHEEP COMPANY, a corpora-
tion,

Appellant,

vs.

C. A. SEWELL, ORENE H. SEWELL and
ORVILLE R. WILSON,

Appellees.

and

BANK OF IDAHO,

Appellant.

vs.

C. A. SEWELL, ORENE SEWELL and
ORVILLE R. WILSON,

Appellees.

Transcript of Record

Appeals from the United States District Court
for the District of Idaho,
Southern Division.

FILED

No. 16390

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WICKAHONEY SHEEP COMPANY, a corporation,

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vs.

C. A. SEWELL, ORENE H. SEWELL and
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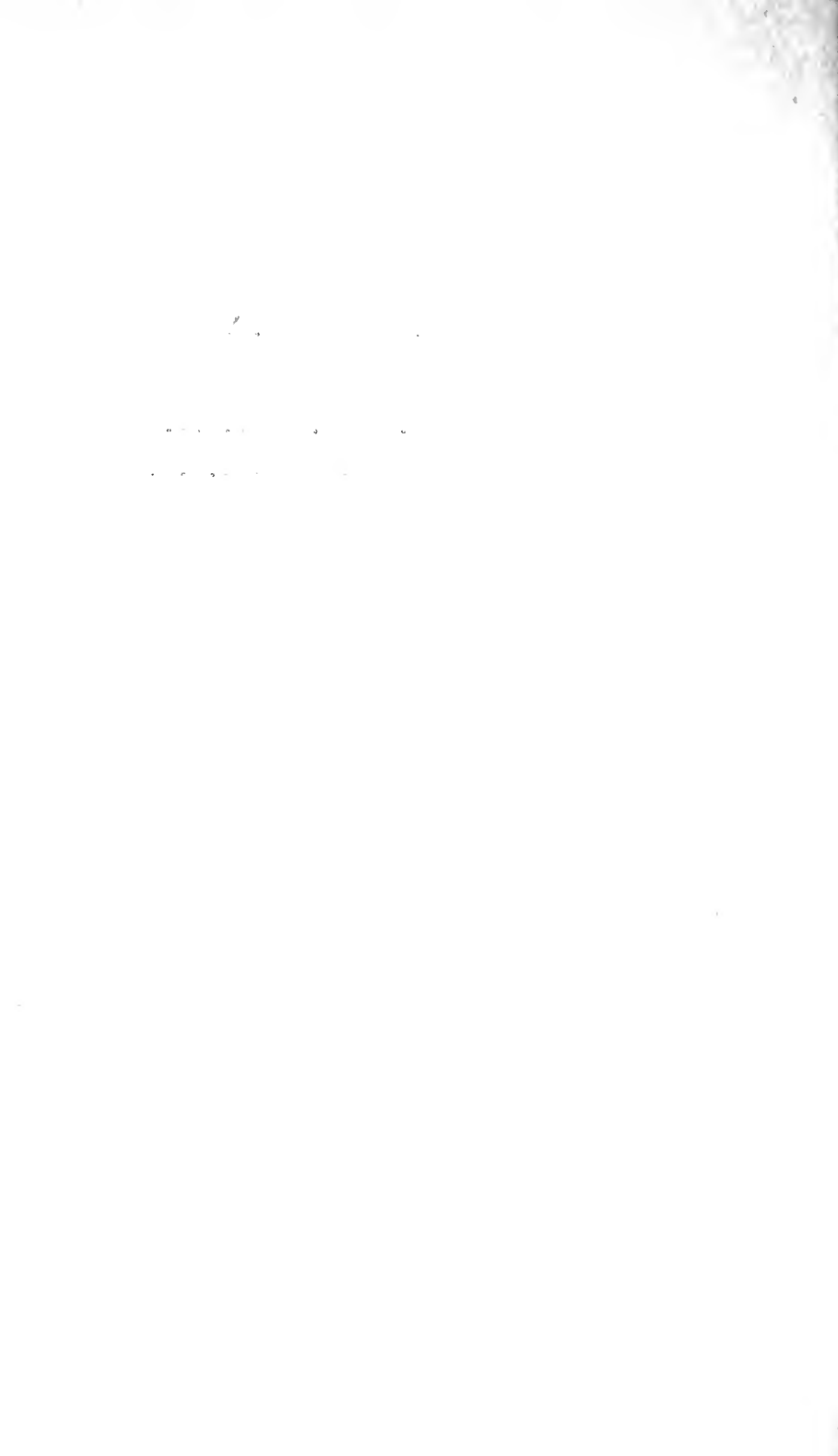
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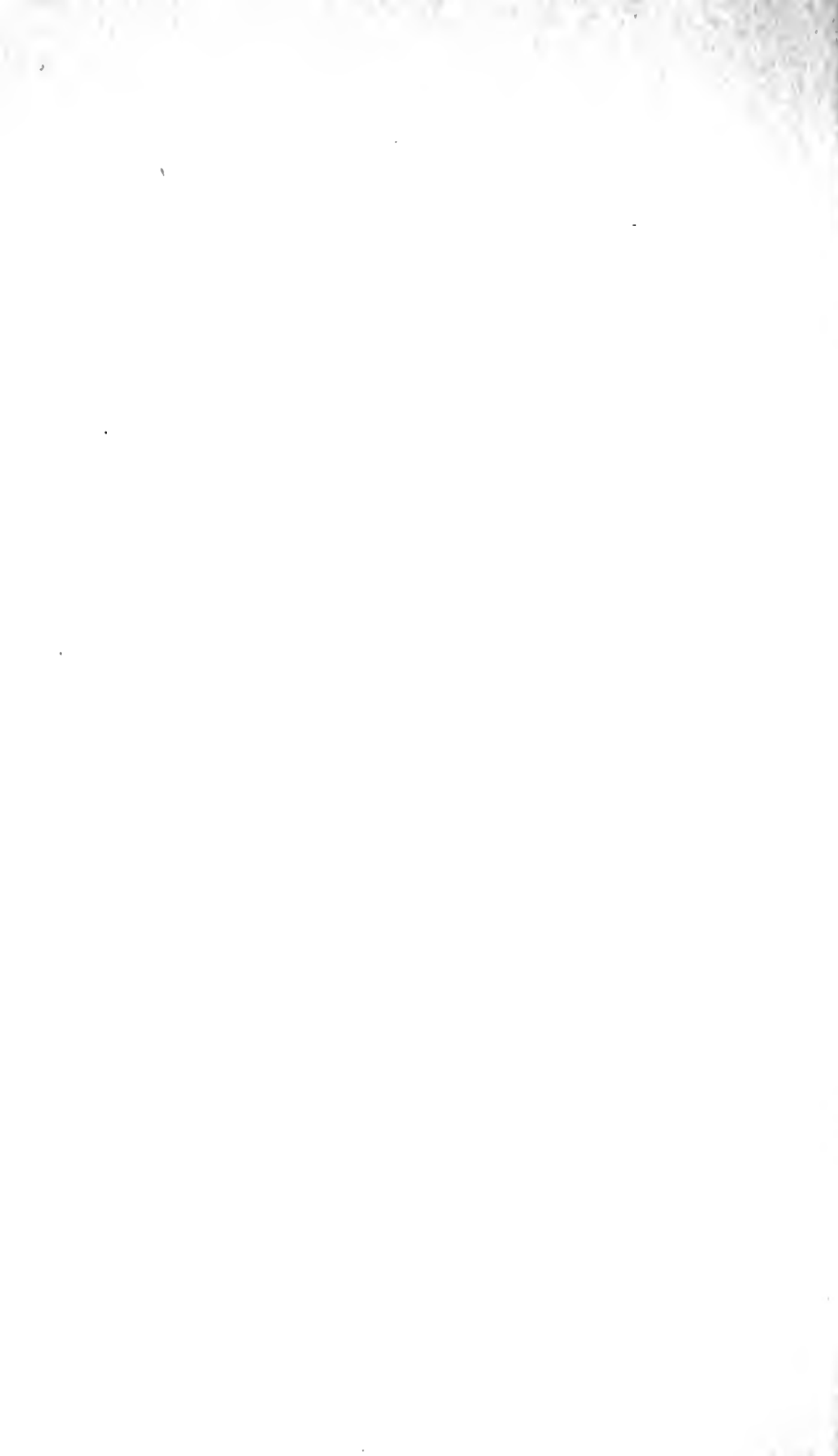
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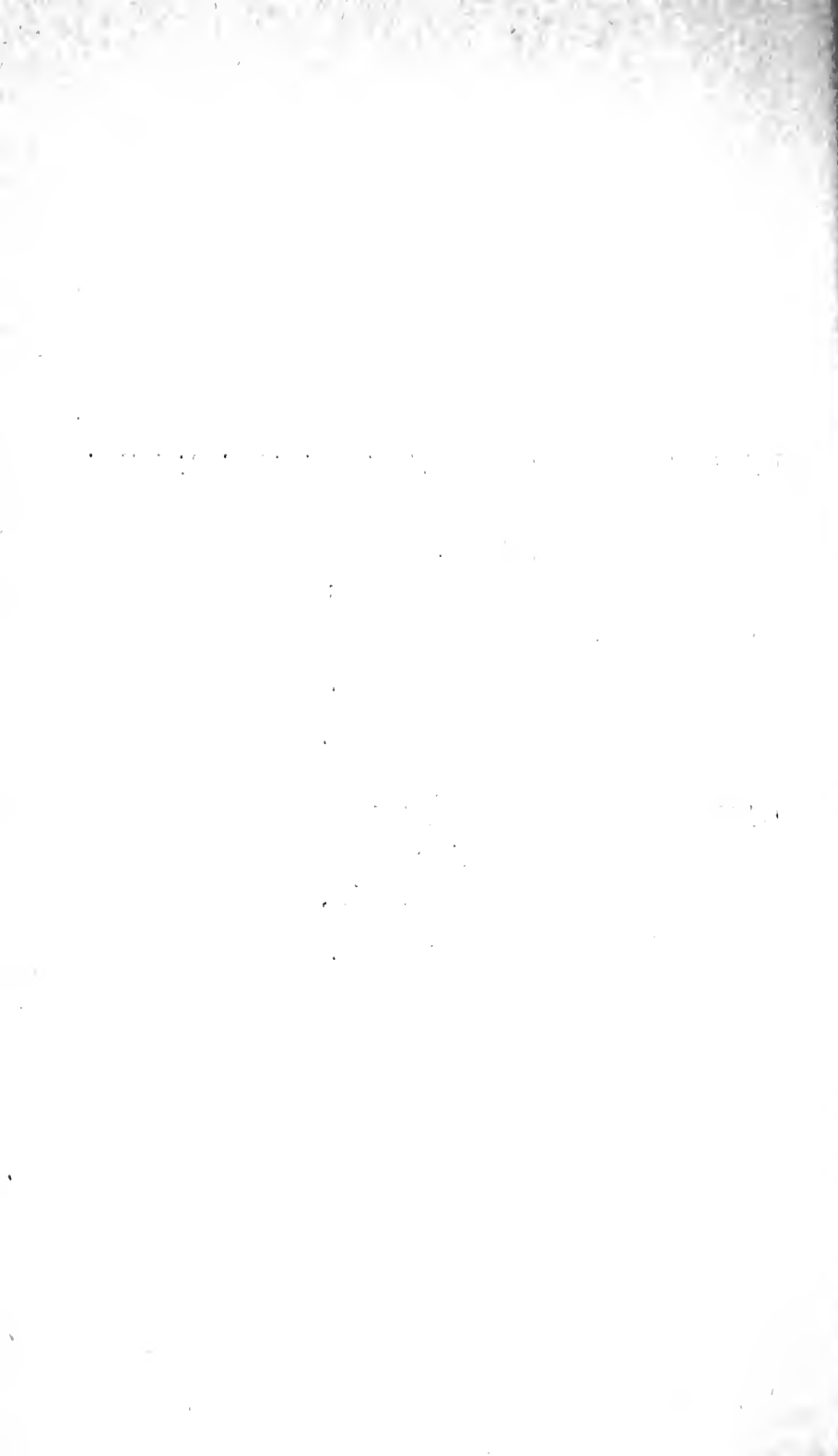


NAMES AND ADDRESSES OF ATTORNEYS

HAWLEY & HAWLEY,
P.O. Box 1617, Boise, Idaho;

ELAM & BURKE,
P.O. Box 2147, Boise, Idaho,
Attorneys for Appellants.

LANGROISE & SULLIVAN,
400 McCarty Building,
P.O. Box 1466, Boise, Idaho,
Attorneys for Appellees.



In the United States District Court for the
District of Idaho, Southern Division

No. 3339

C. A. SEWELL, ORENE H. SEWELL and
ORVILLE R. WILSON,

Plaintiffs,

vs.

WICKAHONEY SHEEP COMPANY, an Idaho
Corporation, and BANK OF IDAHO (Formerly
Continental State Bank), an Idaho Corporation,

Defendants.

COMPLAINT

First Count

Plaintiff for a First Count herein allege:

I.

That the plaintiffs, C. A. Sewell and Orene H. Sewell, are now, and at all times hereinafter mentioned have been, husband and wife. Each and all of the plaintiffs are citizens of the State of Nevada. Defendant, Wickahoney Sheep Company is a corporation, incorporated under the laws of the State of Idaho. Defendant Bank of Idaho (formerly Continental State Bank is a corporation, incorporated under the laws of the State of Idaho. The matter in controversy exceeds, exclusive of interests and costs, the sum of \$3,000.00.

II.

That on or about the 15th day of December, 1955, plaintiffs, C. A. Sewell and Orene H. Sewell, as sellers, entered into a written Purchase Agreement dated December 15, 1955, with defendant, Wickahoney Sheep Company, as purchaser, whereby said sellers promised and agreed to sell to purchaser and purchaser promised and agreed to purchase from sellers all that certain personal property listed and described in Exhibit B attached to said Purchase Agreement for the total purchase price of \$121,700.00, on the terms and conditions set forth in said Purchase Agreement. That a copy of said Purchase Agreement is attached hereto, marked Exhibit A, and by reference made a part hereof as though set forth at length herein.

III.

That said plaintiff, C. A. Sewell and Orene H. Sewell, have duly and regularly assigned said Purchase Agreement to plaintiff, Orville R. Wilson.

IV.

That defendant, Wickahoney Sheep Company, has failed and refused and still fails and refuses to perform said Purchase Agreement and is in default in the performance thereof in the following respects:

(a) Defendant, Wickahoney Sheep Company, has failed and refused and still fails and refuses to make said payment of \$15,000.00 due and payable on October 10, 1956, or any part thereof.

(b) Defendant, Wickahoney Sheep Company, has depleted the 4,005 ewes and 82 bucks, which were part of the personal property sold under said Purchase agreement, to the total number of ewes and bucks of 3,718.

(c) Defendant, Wickahoney Sheep Company, did without the knowledge or consent of plaintiffs make, execute and deliver the following chattel mortgages upon all of the sheep and the increase and lambs thereof which were sold under said purchase agreement, to defendant, Bank of Idaho (formerly Continental State Bank), which said chattel mortgages and the sums of money secured thereby are as follows:

Date of Mortgage	Amount
9/17/56	\$ 50,000
11/ 1/56	50,000
11/27/56	65,000
1/ 5/57	100,000

IV.

That on January 17, 1957, plaintiffs gave defendant, Wickahoney Sheep Company, notice in writing of the above-mentioned defaults as provided in said Purchase Agreement. That more than ninety days have elapsed since said written notice of default was given to defendant, Wickahoney Sheep Company, but said defendant, Wickahoney Sheep Company, has failed and refused and still fails and refuses to remedy said defaults, or any of them. After the expiration of said ninety-day period

plaintiffs claimed a forfeiture of said Purchase Agreement.

V.

That after plaintiffs forfeited said Purchase Agreement, they made demand upon defendant, Wickahoney Sheep Company, for the delivery of the possession of all of said personal property listed and described in said Purchase Agreement and said Exhibit B attached thereto, and all increase and lambs born of said sheep being sold under said Purchase Agreement, and all wool clipped from said sheep, but the defendant, Wickahoney Sheep Company, has failed, refused and neglected and still fails, neglects and refuses to deliver said possession of said personal property, or any part thereof to plaintiffs, and said defendant, Wickahoney Sheep Company, without plaintiffs' consent, wrongfully and unlawfully detains all of said personal property from the possession of plaintiff.

VI.

That none of said personal property, nor any part thereof, has been taken for a tax assessment or a fine, pursuant to statute, or seized under an execution or an attachment against the property of plaintiffs, or any of them, and plaintiffs are entitled to the immediate possession of all of said personal property listed and described in said Purchase Agreement and said Exhibit B attached thereto, and all lambs and increase of the sheep being sold under said Purchase Agreement and of all wool clipped and obtained from said sheep. That

the aggregate value of said personal property is the sum of \$225,100.00.

VII.

That before the commencement of this action the plaintiffs duly performed all the conditions precedent of said Purchase Agreement on their part to be performed.

Second Count

Plaintiffs for a Second Count herein allege:

I.

The plaintiffs reallege paragraphs I, II, III, IV, V, VI, and VII of the First Count of this Complaint, and by reference make them a part of this Count.

II.

That under the terms and provisions of said Purchase Agreement, an executed copy thereof and bills of sale to said personal property were deposited in escrow with the Bank of Idaho (formerly Continental State Bank) at Boise, Idaho, as escrow holder. That after plaintiffs declared a forfeiture of said Purchase Agreement, as aforesaid, plaintiffs made demand on said defendant, Bank of Idaho, to turn over and deliver to plaintiffs said executed copy of said Purchase Agreement and said bills of sale; that defendant, Bank of Idaho, has failed, neglected and refused and still fails, neglects and refuses to turn over and deliver to plaintiffs said executed copy of said Purchase Agreement or said bills of sale.

Third Count

Plaintiffs for a Third Count herein allege:

I.

The plaintiffs reallege paragraphs I, II, III, IV, V, VI, and VII of the first Count of this Complaint, and by reference make them a part of this Count.

II.

That defendant, Bank of Idaho (formerly Continental State Bank), had actual knowledge and notice of said Purchase Agreement, being Exhibit A, attached hereto, and of plaintiffs' ownership of and title to the personal property being sold under said Purchase Agreement. That without the knowledge or consent of plaintiffs, defendant, Bank of Idaho, received and accepted from defendant, Wickahoney Sheep Company, chattel mortgages upon the sheep and the increase thereof owned by plaintiffs as aforesaid, which chattel mortgages and the sums of money secured thereby are as follows:

Date of Mortgage	Amount
9/17/56	\$ 50,000
11/ 1/56	50,000
11/27/56	65,000
1/ 5/57	100,000

That each and every of said chattel mortgages was filed for record in the office of the County Recorder of Owyhee County, State of Idaho.

III.

That each and every of said chattel mortgages above described are a cloud upon plaintiffs' title to said sheep and the increase thereof and that each and every of said chattel mortgages is inferior and subordinate to plaintiffs' ownership of and title to said sheep and the increase thereof.

Wherefore, plaintiffs demand judgment against the defendants as follows:

1. On the First Count, that plaintiffs have judgment against defendant, Wickahoney Sheep Company, for the recovery of the possession of all of said personal property listed and described in said Purchase Agreement, being Exhibit A attached hereto, and in Exhibit B attached to said Purchase Agreement, together with all increase and lambs born of said sheep listed and described therein and together with all wool clipped or obtained from said sheep, or for the sum of \$225,100.00, the value thereof, in case delivery of said personal property cannot be made to plaintiffs.

2. On the Second Count, that defendant, Bank of Idaho (formerly Continental State Bank), be ordered and directed to turn over and deliver to plaintiffs the executed copy of said Purchase Agreement and all bills of sale held by it as escrow holder thereunder.

3. On the Third Count, that said chattel mortgages and all of them be declared inferior and secondary to plaintiffs' ownership of and title to said

sheep and the increase thereof, and the cloud upon plaintiffs' title thereto be removed and that said chattel mortgages be cancelled and discharged of record.

4. That plaintiffs have and recover their costs and disbursements herein incurred and expended, and for such other and further relief as to this Court may seem meet and equitable.

/s/ W. H. LANGROISE,

/s/ W. E. SULLIVAN,

Attorneys for Plaintiff.

EXHIBIT A

Purchase Agreement

This Agreement, made and entered into this 15th day of December, 1955, by and between C. A. Sewell and Orene H. Sewell, husband and wife, of Elko, Nevada, hereinafter called "Sellers," and Wickahoney Sheep Company, an Idaho corporation, with its principal place of business at Boise, Idaho, hereinafter called "Purchaser";

Witnesseth:

1. That the Sellers hereby agree to sell, free and clear of any and all encumbrances, and the Purchasers agree to purchase all of that certain personal property located on and used in connection

with those two ranches known as the "Wickahoney Ranch" and the "Smith Ranch," all in Owyhee County, State of Idaho, which personal property is more particularly described in Exhibit "B," which Exhibit is attached hereto and made a part hereof as if set forth in full herein, for the total purchase price of One Hundred Twenty-one Thousand Seven Hundred and no/100 (\$121,700.00) Dollars, payable by the Purchaser to the Sellers in lawful money of the United States of America, as follows:

The sum of \$15,000.00 which has heretofore been paid by the Purchasers to the Sellers, receipt of which is hereby acknowledged by the Sellers;

The remainder of the purchase price, to wit: The sum of \$106,700.00, to bear interest at the rate of 5% per annum on the unpaid balance from October 10, 1955, payable as follows:

\$15,000.00 to be paid on October 10, 1956, which payment is to be credited first to interest then due and the balance applied to principal;

\$15,000.00 to be paid on October 10, 1957, which payment is to be credited first to interest then due and the balance applied to principal;

\$15,000.00 to be paid on October 10, 1958, which payment is to be credited first to interest then due and the balance applied to principal;

\$15,000.00 to be paid on October 10, 1959, which payment is to be credited first to interest then due and the balance applied to principal;

\$15,000.00 to be paid on October 10, 1960, which payment is to be credited first to interest then due and the balance applied to principal;

\$15,000.00 to be paid on October 10, 1961, which payment is to be credited first to interest then due and the balance applied to principal;

\$15,000.00 to be paid on October 10, 1962, which payment is to be credited first to interest then due and the balance applied to principal;

\$15,000.00 to be paid on October 10, 1963, which payment is to be credited first to interest then due and the balance applied to principal;

And a final payment to be made on October 10, 1964, in the total amount of interest then due plus the remaining balance of the principal.

2. The Purchaser agrees during the life of this agreement to maintain, to maintain, keep in good condition and repair, and otherwise protect the personal property covered by this agreement, and in the event of loss or damage by fire, Purchaser shall repair or replace the property so damaged or destroyed, so that the value of the property covered by this agreement shall remain essentially the same.

3. Simultaneously with the execution of this agreement, Sellers agree to execute a proper bill of

sale or bills of sale selling to the Purchaser all of the above-described personal property, free and clear of liens and encumbrances, and that an executed copy of this agreement, together with the executed bill of sale or bills of sale shall be deposited in escrow with the Continental State Bank at Boise, Idaho, with instructions to said escrow holder to accept the payments when made by the Purchaser as provided herein, for the account of the Sellers, and that when the total sum of \$106,700.00, together with interest at 5% per annum on the unpaid balance, has been paid by the Purchaser in the installments as provided in this agreement, the escrow holder shall deliver to the Purchaser the bill of sale or bills of sale and any and all papers or instruments held by it in escrow subject to the terms of this agreement.

4. The Sellers agree to pay all taxes and assessments for the year 1954, and prior thereto, which have been levied or assessed by reason of the personal property herein sold. The Purchaser agrees to pay all such taxes and assessments due for the year 1956 and thereafter. Such personal property taxes and assessments due for the year 1955 shall be prorated between the parties as of October 18, 1955, the Sellers paying the portion due for January 1 through October 18, 1955, and the Purchasers, the balance.

5. Time is of the essence of this agreement, and should Purchaser be in default in any of the terms or conditions of this agreement, Sellers shall give

Purchaser notice of such claimed default in writing, addressed to Purchaser at 212 Continental Bank Building, Boise, Idaho, to be sent by registered or certified mail, postage prepaid, return receipt requested, and thereafter Purchaser shall have ninety (90) days within which to remedy the claimed default. Should the Purchaser fully perform those matters claimed to be in default as set out in said notice within said ninety-day period, no forfeiture may be declared or shall become effective. However, in the event that Purchaser fails to remedy the claimed default within the ninety-day period, Seller may claim a forfeiture of this agreement and shall have the right to retake possession of the personal property herein described, or its replacements, and the Sellers may retain all payments made hereunder as liquidated damages. It is further agreed that any delay or departure from the terms of this agreement, or any delay in enforcing the performance thereof, by or with the consent of the Sellers, shall not operate to waive or be a waiver of the right of the Sellers to stand upon the strict letter and construction of the terms hereof and shall not be construed to be a waiver of the right of the Sellers to enforce performance under this agreement in accordance with its terms.

6. The Sellers agree to give possession of the above-described personal property to the Purchaser on or before October 18, 1955.

7. This agreement shall be binding upon and inure to the benefit of the heirs, executors, ad-

ministrators, successors and assigns of the parties hereto.

In Witness Whereof the parties hereto have hereunto set their hands and seals the day and year first above written.

C. A. SEWELL,
ORENE H. SEWELL,
Sellers.

WICKAHONEY SHEEP
COMPANY,
An Idaho Corporation,
Purchaser;

[Seal] By CIRIACO LEZAMIZ,
President.

Attest:

JOHN M. DAHL,
Secretary.

Duly verified.

[Endorsed]: Filed May 8, 1957.

[Title of District Court and Cause.]

MOTION TO DISMISS AND MOTION FOR
MORE DEFINITE STATEMENT

Come Now the defendants herein, and move the Court to dismiss the complaint for the reason that the same does not state a claim against the defend-

ants, or either of them, upon which relief may be granted.

Further, the defendants move that the plaintiffs be required and ordered to furnish a more definite statement of the nature of their claim, as set forth in the complaint, in the following particulars:

First Count:

1. Referring to Paragraph III, plaintiffs allege an assignment of said purchase agreement to Orville R. Wilson, and it is impossible to ascertain from said paragraph, nor any allegation therein, when said purported assignment was made, nor the terms and nature thereof.

2. Referring to Paragraph IV, it is impossible to ascertain from any allegation therein the contents, nature and effect of the purported notice of default as alleged therein, and how or in what manner said notice was communicated to defendant Wickahoney Sheep Company. Further, it is impossible to ascertain from said paragraph, or any allegation therein, how or in what manner the plaintiffs claimed a forfeiture of said purchase agreement.

3. Referring to Paragraph V, it is impossible to ascertain from any allegation therein the nature and form of the purported demand made upon the defendant Wickahoney Sheep Company for delivery of the personal property, and whether or not the same was oral or in writing, or how the

same was communicated to the said defendant Wickahoney Sheep Company.

Second Count:

1. Defendants reallege their paragraphs 1, 2 and 3 above set out in this motion as applicable to Paragraph I of plaintiffs' second count.

2. Referring to Paragraph II, it is impossible to ascertain from any allegation therein the terms and conditions upon which said purchase agreement and bill of sale were deposited in escrow with the Bank of Idaho as escrow holder, and how or in what manner plaintiffs made demand upon said defendant Bank of Idaho. Further, it is impossible to ascertain whether or not, in making such purported demand and in declaring the forfeiture, the plaintiffs complied with the terms of said escrow agreement, if any.

Third Count:

1. Defendants reallege their paragraphs 1, 2 and 3 above set out in this motion under First Count as applicable to Paragraph I of plaintiffs' third count.

2. Referring to Paragraph II, it is impossible to ascertain from any allegation therein how or in what manner the plaintiffs will claim actual knowledge and notice of said purchase agreement on the part of defendant Bank of Idaho.

For the reasons referred to above, the complaint

of the plaintiffs is so vague and ambiguous that the defendants find it impossible to prepare a responsive pleading thereto, and in that connection defendants allege they should not be required to prepare such responsive pleading without a more definite statement from the plaintiffs in connection with said allegations.

Dated this 5th day of June, 1957.

HAWLEY & HAWLEY,

By /s/ JESS B. HAWLEY, JR.,
Attorneys for Defendants.

Service of copy acknowledged.

[Endorsed]: Filed June 5, 1957.

[Title of District Court and Cause.]

MINUTE ORDER—JUNE 11, 1957

Judge Chase A. Clark.

This matter came on for hearing on defendants' Motion to Dismiss and Motion for More Definite Statement, Willis Sullivan, Esquire, appearing as counsel for plaintiffs and Jess Hawley, Esquire, appearing for defendants.

After hearing counsel, the Court denied the motions and granted defendants 30 days to answer.

[Title of District Court and Cause.]

ANSWER AND COUNTER-CLAIM

Come Now the defendants and each of them, and in answer to the complaint of the plaintiffs on file herein admit, deny and allege as follows:

First Count

I.

Answering Paragraph I, defendants deny that the matter in controversy exceed, exclusive of interest and costs, the sum of \$3,000.00. Defendants admit each and every other allegation therein.

II.

Answering Paragraph II, defendants admit each and every allegation therein.

III.

Answering Paragraph III, defendants allege that they do not have information sufficient to form a belief as to the truth of the allegations therein, and for that reason deny each and every allegation therein contained.

IV.

Answering Paragraph IV of said complaint, defendants deny each and every allegation therein.

V.

Answering the second paragraph numbered IV, defendants deny each and every allegation therein contained.

VI.

Answering Paragraph V, defendants deny each and every allegation therein.

VII.

Answering Paragraph VI, defendants admit that none of said personal property, nor any part thereof, has been taken for taxes, fine pursuant to statute, or seized under execution or attachment against the plaintiffs. Defendants deny each and every other allegation therein.

VIII.

Answering Paragraph VII of said complaint, defendants deny each and every allegation therein.

Second Count

I.

In answer to Paragraphs I through VII, defendants reallege their answering Paragraphs I through VIII of the First Count, and by reference make them a part of this answer to the Second Count.

II.

Answering Paragraph II, defendants admit that an executed copy of the purchase agreement and bills of sale were deposited with defendant Bank of Idaho as escrow holder. Defendants deny each and every other allegation therein.

Third Count

I.

In answer to Paragraphs I through VII, defendants reallege their answering Paragraphs I through VIII of the First Count, and by reference make them a part of this answer to the Third Count.

II.

Answering Paragraph II, defendants deny each and every allegation therein.

III.

Answering Paragraph III, defendants deny each and every allegation therein.

First Defense to First, Second and Third Counts:

Defendants allege that said complaint does not, nor any count therein contained, state a claim against these defendants upon which relief can be granted.

Second Defense to First, Second and Third Counts:

Defendants allege that, coincidentally with the execution of the purchase agreement, Exhibit A to the complaint, defendants and plaintiffs C. A. Sewell and Orene H. Sewell made and entered into an escrow agreement under date December 15, 1955, under which said purchase agreement referred to

and certain bills of sale were deposited with Continental State Bank (now Bank of Idaho); that a true and correct copy of said escrow agreement is appended hereto as Exhibit A to this answer and by reference incorporated as a part hereof as though set out in haec verba;

That under and pursuant to the terms of said escrow agreement, in the event plaintiffs C. A. Sewell and Orene H. Sewell elected to declare a default of the purchase agreement they were required to deliver to the escrow holder notification of default in duplicate, with instructions to the said escrow holder to mail the original notification of default by registered mail to defendant Wickahoney Sheep Company. Further, pursuant to said escrow agreement as aforesaid, it was provided therein that "all notices given pursuant to the terms of any agreement placed in escrow herewith must be given through the escrow holder as hereinafter provided, and said escrow holder shall not be required to recognize service of notice given in any other manner"; that the said plaintiffs, in connection with the pretended and alleged forfeiture as set forth in the complaint, did not in any respects comply with the provisions of the escrow agreement, Exhibit A to this answer, with respect thereto. Defendants further allege that said pretended forfeiture as set forth in the complaint is a nullity and of no force nor binding effect upon the defendants, nor either of them.

Third Defense to First, Second and Third Counts
and Counter-claim:

Defendants allege as follows:

I.

That on or about the 15th day of December, 1955, plaintiffs C. A. Sewell and Orene H. Sewell, as sellers, and defendant Wickahoney Sheep Company, as buyer, made and entered into a written purchase agreement, Exhibit A to the complaint, which agreement is referred to and by reference incorporated as a part hereof as though set forth in haec verba, whereby sellers therein agreed to sell and buyers agreed to buy certain personal property as described in said Exhibit A to the complaint. In addition thereto, and at the same time, plaintiffs C. A. Sewell and Orene H. Sewell leased to defendant Wickahoney Sheep Company certain grazing lands in Owyhee County, State of Idaho, together with any and all grazing rights appurtenant thereto, for the purpose of keeping and grazing the said 4,005 ewes and 82 bucks referred to in the said purchase agreement; that said leases were for the terms of ten years, to coincide with the term of the purchase agreement as aforesaid.

II.

That the said purchase agreement, Exhibit A to the complaint, was obtained by the plaintiffs C. A. Sewell and Orene H. Sewell by fraud and misrepresentation made to defendant Wickahoney

Sheep Company, its agents, servants and employees; that none of the sheep referred to in the purchase agreement as aforesaid were over the age of five years; that the grazing lands and grazing rights appurtenant thereto, leased to defendant Wickahoney Sheep Company as aforesaid, were fully and completely adequate to keep, graze and hold all of the sheep referred to in said purchase agreement, without the necessity for defendant Wickahoney Sheep Company acquiring any additional grazing lands or grazing rights; that the sheep referred to in said purchase agreement were owned by plaintiffs C. A. Sewell and Orene H. Sewell free and clear of any encumbrance of any type or kind whatever; that all of said representations as aforesaid, made by the plaintiffs to defendant Wickahoney Sheep Company were in fact false and fraudulent, all of which plaintiffs well knew, and which representations were made by said plaintiffs to defendant Wickahoney Sheep Company for the purposes of deceiving it; that in truth and in fact in excess of six hundred of the said ewes were over five years of age, ranging from six to eight years in age; that the grazing lands and grazing rights were insufficient and inadequate to graze and hold the sheep which were the subject matter of the purchase agreement as aforesaid, and defendant Wickahoney Sheep Company was forced and required to and did lease additional grazing lands in order to properly sustain and graze said herd; that the sheep involved in said purchase agreement as aforesaid were encumbered by chattel

mortgage made and executed by plaintiffs C. A. Sewell and Orene H. Sewell as mortgagors to Producers Livestock Loan Company as mortgagee, prior to December 15, 1955, in the amount of \$50,000.00, the same being unsatisfied as of the date of execution of said purchase agreement, and constituting a lien and encumbrance against said sheep.

III.

That the defendant Wickahoney Sheep Company relied fully upon the representations made by plaintiffs C. A. Sewell and Orene H. Sewell, and believed the same to be true, and relying upon the truth of the representations as aforesaid, which were in fact false and fraudulent and well known to the plaintiffs to be so, the defendant Wickahoney Sheep Company was misled and induced to execute said purchase agreement, Exhibit A to the complaint, which defendant Wickahoney Sheep Company would not have done upon the terms and conditions set forth therein other than for the false and fraudulent representations made by the said plaintiffs.

IV.

That as a direct and proximate result of the false and malicious representations of the plaintiffs as aforesaid, inducing the defendant Wickahoney Sheep Company to enter into said purchase agreement, Exhibit A to the complaint, the defendant Wickahoney Sheep Company has been damaged in the amount of \$12,500.00 because of the

misrepresentation as to the ages of said sheep, and in the amount of \$10,000.00 as a result of the additional grazing lands and grazing rights that it has and must acquire in order to hold and graze said sheep as aforesaid.

Wherefore, Defendants Pray for judgment against the plaintiffs as follows:

1. That said complaint, together with all the counts therein, be dismissed, and that defendants have their costs necessarily incurred herein;

2. That the purported forfeiture of said purchase agreement as set forth in the complaint be declared ineffective and held for naught, and that said purchase agreement be declared to be in full force and effect and binding between the parties thereto;

3. That defendant Wickahoney Sheep Company have judgment against the plaintiffs on its counterclaim in the amount of \$22,500.00;

4. That the defendants have and recover their costs and disbursements in this action necessarily expended and incurred, and for such other and further relief as to this Court may seem just and equitable.

HAWLEY & HAWLEY,

By /s/ JESS B. HAWLEY, JR.,
Attorneys for Defendants.

Service of the within and foregoing Answer acknowledged by receipt of a copy thereof this 17th day of July, 1957.

W. H. LANGROISE,
W. E. SULLIVAN,

By /s/ W. E. SULLIVAN,
Attorneys for Plaintiffs.

EXHIBIT A

Escrow Agreement

This escrow agreement entered into this 15th day of December, 1955, between C. A. Sewell and Orene H. Sewell as Grantors, and Wickahoney Sheep Company and, as Grantees, and Continental State Bank, hereinafter referred to as the Bank, as escrow holder:

For and in consideration of the following compensation and promises the Bank agrees to act as Escrow Holder.

An initial filing fee of \$. . . ., and a collection fee of cents per hundred or fraction thereof of funds collected, with a minimum fee of for each payment, together with its actual and necessary expenses, including attorney's fees.

Said collection fees to be paid by Wickahoney Sheep Company.

It is hereby agreed that said Bank shall not be liable for any loss or injury suffered or incurred by the Grantors or Grantees under any terms of the escrow or this agreement unless through negligence or wilful misconduct on the part of the Bank.

The parties hereto hereby further agree that the liability of the Bank shall be only for the safekeeping of any and all papers, documents and other instruments deposited herewith, and for the proper accounting and disbursement of all sums of money which may be deposited with it as the Escrow Holder and that the Bank is not liable for nor does it guarantee, warrant, or undertake to pass on the legality or sufficiency of any of the instruments placed with this escrow.

The parties hereto further agree that if any dispute shall arise among them regarding any part, term, or phrase of the contract deposited with this escrow, including any disagreement regarding whether any party or parties shall be in default with respect to any provision of the agreement or if any of the terms or provisions of the contract shall be uncertain, vague, or obscure then the parties to the contract, on demand of the Bank, shall deposit with the Bank a signed statement defining the meaning of such uncertain term or provision, or whether a default exists, and what shall be done about it. If the parties hereto refuse or fail to provide such a statement within thirty days after demand is made on them by the Bank, then the Bank shall be released from its obligation

to act as Escrow Holder. Upon being so released the Bank shall on written demand surrender said escrow to a new escrow holder or joint nominee of all of the parties to the escrow contract, but it shall not be liable to any or all of the parties for damages or costs for its refusal to surrender said escrow to anyone else. If the Bank is released from its duties as Escrow Holder as hereinbefore provided it shall be entitled to keep or retain any fee or compensation paid to it as such escrow holder.

Time is, and shall be, the essence and part of the consideration of the contract and in the event the Seller shall declare a default, he shall deliver to the bank as Escrow Holder, Notification of Default, in duplicate, with written instructions to the Escrow Holder to mail the original to the Purchaser by United States Registered Mail. In case the delinquent payment or payments or other causes of default shall not be made or corrected as specified in the Notification of Default within a period of thirty days from the date of mailing of the Notice of Default to the Purchaser then all documents shall be returned to the Grantors. It shall be the duty of both Seller and Purchaser to keep the Escrow Holder advised in writing at all times of their respective mailing addresses, and upon failure to do so the mailing of any notice to the address shown herein shall be conclusive evidence that notice has properly been given. All notices given pursuant to the terms of any agreement placed in escrow herewith must be given through the Escrow

Holder as hereinbefore provided, and said Escrow Holder shall not be required to recognize service of notice given in any other manner. The duplicate notice shall be retained with the escrow file. The expense of this notification, the Seller agrees to pay. The name and post office address of each of the parties to the contract are:

Name: C. A. Sewell and Orene H. Sewell.

Post Office Address: Henderson Bank Bldg.,
Elko, Nevada.

Name: Wickahoney Sheep Company.

Post Office Address: 212 Continental Bank
Bldg., Boise, Ida.

Said escrow consists of the following documents which are deposited herewith:

Warranty Deed: Quitclaim Deed:
Other Deed: Rev. Stamps \$. Contract:
XX. Mortgage: Abstract: Insurance:
..... Stock: Other Papers: Bill of Sale.

The parties hereto agree that if any payment called for in the agreement is not made to the bank as escrow holder within one year after the date due as specified and if during such period of time no Notification of Default is received from the Sellers then the Bank, at its option, may consider the escrow as terminated and return all documents to the Sellers by registered mail, addressed to the last known address of the Sellers. This provision is for the sole purpose to authorize the release of the Bank as escrow holder under such circum-

stances if it so desires, and it is not a part of any contract pertaining to any sale.

It is further agreed that if any part of the escrow agreement and this agreement are in conflict, then the provisions of this agreement shall govern.

Until further written notice to the escrow holder, signed by each of the parties of the first part, payments as received on this escrow agreement shall be disposed of as follows:

Credit Checking Account

Credit Savings Account

Remit X

Other

Lastly, the heirs, executors, administrators, successors, and assigns of the undersigned shall be governed and bound by the provisions hereof.

In Witness Whereof, the undersigned have hereunto set their hands the day and year first above written.

C. A. SEWELL,
ORENE H. SEWELL,
WICKAHONEY SHEEP
COMPANY,

An Idaho Corp.;

President.

By CIRIACO LEZAMIZ,

In Consideration of the compensation mentioned in the foregoing agreement to be paid to the undersigned as holder of the escrow described therein

and of the promises and agreements to the said bank therein contained, the undersigned hereby agrees to act as such escrow holder, and acknowledges receipt of above-listed papers.

CONTINENTAL STATE
BANK,

By /s/ S. C. PRITCHARD.

[Endorsed]: Filed July 19, 1957.

[Title of District Court and Cause.]

REPLY TO COUNTER-CLAIM

Come now the plaintiffs and each of them, and in reply to the defendants' Counter-claim on file herein admit, deny and allege as follows:

I.

In reply to paragraph I of said Counter-claim, the plaintiffs admit the allegations therein contained, except that the plaintiffs deny that said Lease was for the purpose of keeping and grazing the said 4,005 ewes and 82 bucks referred to in said Purchase Agreement, and further that the term of said lease was to coincide with the term of the said Purchase Agreement.

II.

In reply to paragraph II of said Counter-claim the plaintiffs deny the same and the whole thereof, and each and every allegation therein contained, except that plaintiffs admit that the sheep involved

in said Purchase Agreement were encumbered by a chattel mortgage made and executed by plaintiffs, C. A. Sewell and Orene H. Sewell, as mortgagors to Producers Livestock Loan Company as mortgagee, prior to December 15, 1955, in the amount of \$50,000, the same being unsatisfied as of the date of execution of said Purchase Agreement; and in that connection plaintiffs allege that during the month of June, 1956, said mortgage was fully paid, satisfied and discharged and that the same was not at any time thereafter and is not now a lien or encumbrance against said sheep.

III.

In reply to paragraph III of said Counter-claim the plaintiffs deny the same and the whole thereof, and each and every allegation therein contained.

IV.

In reply of paragraph IV of said Counter-claim the plaintiffs deny the same and the whole thereof, and each and every allegation therein contained.

Wherefore, plaintiffs demand judgment that the Counter-claim of defendants herein be dismissed and that plaintiffs have and recover their costs and disbursements herein incurred and expended.

/s/ W. H. LANGROISE,

/s/ W. E. SULLIVAN,

Attorneys for Plaintiffs.

Receipt of copy acknowledged.

[Endorsed]: Filed August 13, 1957.

[Title of District Court and Cause.]

MOTION TO DEPOSIT IN COURT

Comes Now one of the defendants named herein, Bank of Idaho (formerly Continental State Bank), an Idaho corporation, by and through its attorneys of record, and, pursuant to the provisions of Rule 67 of the Federal Rules of Civil Procedure, respectfully moves that this defendant be authorized by the court to deposit therewith the following:

All bills of sale and the executed copy of the purchase agreement, and any other documents escrowed with defendant Bank of Idaho by plaintiffs C. A. Sewell and Orene H. Sewell and defendant Wickahoney Sheep Company, pursuant to the terms of the purchase agreement entered into between said parties, and pleaded herein as Exhibit A to the complaint, said defendant Bank of Idaho waiving and disclaiming any right or title thereto or interest therein;

That defendant Bank of Idaho be further authorized to deposit with this court the original chattel mortgaged pleaded by the plaintiffs in Paragraph IV(c) of the complaint, showing the same to be satisfied of record in the office of the County Recorder, Owyhee County, State of Idaho, as of August 27, 1957, together with true and correct copies of the satisfactions thereof.

This Motion is made upon the records and files of this proceedings, together with the affidavit of Jess

B. Hawley, Jr., attached hereto and by reference made a part hereof.

Dated this 10th day of September, 1957.

HAWLEY & HAWLEY,

By /s/ JESS B. HAWLEY, JR.,
Attorneys for Defendant
Bank of Idaho.

State of Idaho,
County of Ada—ss.

Jess B. Hawley, Jr., being first duly sworn, deposes and says:

That he is over the age of twenty-one years, and a licensed attorney duly authorized to practice law in the State of Idaho; that he is one of the attorneys representing the defendant Bank of Idaho herein;

That on or about the 26th day of August, 1957, the defendant Bank of Idaho delivered to affiant executed satisfactions of all of the chattel mortgages as pleaded in Paragraph IV(c) of the complaint on file herein, said mortgages bearing instrument numbers 94875, 94975, 95070 and 95318, respectively, in the office of the County Recorder, Owyhee County, State of Idaho; that upon said date affiant mailed said satisfactions of mortgages as aforesaid to the County Recorder, Owyhee County, Idaho, and thereafter received from said County Recorder the original chattel mortgages re-

ferred to, bearing the stamp, signature and seal of said County Recorder showing the same to be satisfied and fully discharged of record; that photostatic copies of said satisfactions are attached hereto and made a part of this affidavit;

That said chattel mortgages, being satisfied and discharged as of August 27, 1957, the same do not constitute an encumbrance upon the chattels mortgaged thereunder, and do not constitute a cloud upon plaintiffs' title thereto.

Further affiant saith not.

/s/ JESS B. HAWLEY, JR.

Subscribed and sworn to before me this 10th day of September, 1957.

[Seal] /s/ M. F. LANE,

Notary Public for Idaho.

Know All Men by These Presents, That Ray F. Archibald, Asst. V. P., The Continental State Bank, Boise, Idaho, does hereby certify and declare that a certain mortgage bearing date the 1st day of November, A.D. 1956, made and executed by Wickahoney Sheep Company the party of the first part therein, to Continental State Bank, Boise, Idaho, the party of the second part therein, filed for record as No. 94975 of chattel mortgages and indexed in Book.... of Minutes of Mortgages of Personal Property, on page.... of the Public Records in the office of the County Recorder of the County of

Owyhee, State of Idaho, on the 7th day of November, 1956, together with the debt thereby secured, is fully paid, released, satisfied, and discharged.

In Witness Whereof, The said corporation herein first above mentioned has caused its corporate name to be hereunto subscribed and its corporate seal affixed by its Cashier, thereunto duly authorized, this 22nd day of August, A.D. 1957.

[Seal] CONTINENTAL STATE BANK,
Boise, Idaho,

By /s/ RAY F. ARCHIBALD,
Asst. Vice President.

Duly verified.

Know All Men by These Presents, That Ray F. Archibald, Asst. V. P., The Continental State Bank, Boise, Idaho, does hereby certify and declare that a certain mortgage bearing date the 5th day of January, A.D. 1957, made and executed by Wickahoney Sheep Company the party of the first part therein, to Continental State Bank, Boise, Idaho, the party of the second part therein, filed for record as No. 95318 of chattel mortgages and indexed in Book.... of Minutes of Mortgages of Personal Property, on page.... of the Public Records in the office of the County Recorder of the County of Owyhee, State of Idaho, on the 7th day of January,

1957, together with the debt thereby secured, is fully paid, released, satisfied, and discharged.

In Witness Whereof, The said corporation herein first above mentioned has caused its corporate name to be hereunto subscribed and its corporate seal affixed by its Cashier, thereunto duly authorized, this 22nd day of August, A.D. 1957.

[Seal] CONTINENTAL STATE BANK,
Boise, Idaho,

By /s/ RAY F. ARCHIBALD,
Asst. Vice President.

Duly verified.

Know All Men by These Presents, That Ray F. Archibald, Asst. V. P., The Continental State Bank, Boise Idaho, does hereby certify and declare that a certain mortgage bearing date the 27th day of November, A.D. 1956, made and executed by Wickahoney Sheep Company the party of the first part therein, to Continental State Bank, Boise, Idaho, the party of the second part therein, filed for record as No. 95070 of chattel mortgages and indexed in Book.... of Minutes of Mortgages of Personal Property, on page.... of the Public Records in the office of the County Recorder of the County of Owyhee, State of Idaho, on the 28th day of November, 1956, together with the debt thereby secured, is fully paid, released, satisfied, and discharged.

In Witness Whereof, The said corporation herein first above mentioned has caused its corporate name to be hereunto subscribed and its corporate seal affixed by its Cashier, thereunto duly authorized, this day of, A.D., 19.....

[Seal] CONTINENTAL STATE BANK,
Boise, Idaho,

By /s/ RAY F. ARCHIBALD,
Asst. Vice President.

Duly verified.

Know All Men by These Presents, That Ray F. Archibald, Asst. V. P., The Continental State Bank, Boise, Idaho, does hereby certify and declare that a certain mortgage bearing date the 17th day of September, A.D. 1956, made and executed by Wickahoney Sheep Company the party of the first part therein, to Continental State Bank, Boise, Idaho, the party of the second part therein, filed for record as No. 94865 of chattel mortgages and indexed in Book of Minutes of Mortgages of Personal Property, on page.... of the Public Records in the office of the County Recorder of the County of Owyhee, State of Idaho, on the 1st day of October, 1956, together with the debt thereby secured, is fully paid, released, satisfied, and discharged.

In Witness Whereof, The said corporation herein first above mentioned has caused its corporate name

to be hereunto subscribed and its corporate seal affixed by its Cashier, thereunto duly authorized, this 22nd day of August, A.D. 1957.

[Seal] CONTINENTAL STATE BANK,
Boise, Idaho,

By/s/ RAY F. ARCHIBALD,
Asst. Vice President.

Duly verified.

Receipt of Copy acknowledged.

[Endorsed]: Filed September 11, 1957.

[Title of District Court and Cause.]

MINUTE ORDER—OCTOBER 4, 1957

Judge Murphy.

This matter came on for hearing on defendant's motion to deposit. Willis E. Sullivan appearing as counsel for the plaintiff and John B. Hawley, Jr. appearing as counsel for the defendants. After hearing the motion the Court granted the motion.

[Title of District Court and Cause.]

MOTION FOR LEAVE TO FILE SUPPLEMENTAL COMPLAINT

Come now the above-named plaintiffs and move this Honorable Court for an Order permitting

plaintiffs to file their Supplemental Complaint for the reasons and upon the grounds set forth in said Supplemental Complaint, copy of which is hereto attached as Exhibit A and made a part hereof.

/s/ W. H. LANGROISE,

/s/ W. E. SULLIVAN,

Attorneys for Plaintiffs.

Service of Copy acknowledged.

[Endorsed]: Filed October 4, 1957.

[Title of District Court and Cause.]

MOTION FOR APPOINTMENT OF TEMPORARY RECEIVER AND ORDER TO SHOW CAUSE WHY A PERMANENT RECEIVER SHOULD NOT BE APPOINTED

Comes now one of the defendants, Wickahoney Sheep Company, an Idaho corporation, and moves this Court for the appointment of a temporary receiver of all of the property of the defendant, Wickahoney Sheep Company, with the usual powers and with power to mortgage so much of the property in his hands as may be necessary to administer and preserve all of the property which will come into his possession in good condition, and for an order to show cause why a permanent receiver should not be appointed until such time as this controversy may be heard and finally adjudged.

This motion is based on the affidavit of Jess B. Hawley, Jr., attached hereto, the files and records of this case, Rule 66 of the Federal Rules of Civil Procedure, and Rule 19 of the United States District Court for the District of Idaho.

Dated at Boise, Idaho, this 4th day of October, 1957.

HAWLEY & HAWLEY,

By /s/ JESS B. HAWLEY, JR.,
Attorneys for Defendant Wickahoney Sheep Com-
pany.

[Endorsed]: Filed October 4, 1957.

[Title of District Court and Cause.]

AFFIDAVIT

State of Idaho,
County of Ada—ss.

Jess B. Hawley, Jr., being first duly sworn on oath deposes and says:

1. That he is a member of the firm of Hawley & Hawley, attorneys at law, Boise, Idaho, which firm represents the defendant, Wickahoney Sheep Company, in this action, and as such is familiar with the corporation, its books and accounts, and its present business operations;

2. That the principal property of the Wicka-

honey Sheep Company is the band of sheep which is the subject matter of this controversy.

3. That the Wickahoney Sheep Company has operated at a loss during this past season and is at the present time without any funds whatever to maintain and care for the sheep;

4. That as of the 1st day of October, 1957, wages due the sheepherders who are in charge of the sheep are three months in arrears, and the sheepherders have threatened to immediately leave the employ of Wickahoney Sheep Company, which would result in abandonment of the sheep;

5. That because of this controversy, the Wickahoney Sheep Company is unable to obtain any funds for the care and maintenance of said sheep, by either selling or mortgaging any of the band of sheep, its only property;

6. That unless the Wickahoney Sheep Company is able to obtain funds to pay the sheepherders and to otherwise care for and maintain the sheep, it will be impossible for it to preserve the subject matter of this controversy;

7. That affiant is informed and believes that an emergency exists requiring the immediate appointment of a receiver of all of the property of Wickahoney Sheep Company.

/s/ JESS B. HAWLEY, JR.

Subscribed and sworn to before me this 4th day of October, 1957.

[Seal] /s/ GORDON C. SMITH,
Notary Public for Idaho.

[Endorsed]: Filed October 4, 1957.

[Title of District Court and Cause.]

ORDER AUTHORIZING DEPOSIT
IN COURT

This cause came on regularly for hearing before the Honorable Edward P. Murphy, on the 4th day of October, 1957, at the hour of 10 o'clock a.m., upon the motion of the defendant, Bank of Idaho, to deposit in court, Jess B. Hawley, Jr., appearing for the defendants, and W. R. Sullivan appearing for the plaintiffs, whereupon the Court, after consideration of the motion and after argument of counsel for the respective parties, and good cause appearing therefor, does order as follows:

1. That the motion of the defendant, Bank of Idaho, be and the same is hereby granted;

2. That defendant, Bank of Idaho, be authorized to deposit in the registry of this court all bills of sale, the executed copy of the purchase agreement, and any other documents theretofore es-crowed with it by the plaintiffs and defendant, Wickahoney Sheep Company.

Further, that the defendant, Bank of Idaho, be authorized to deposit with the registry of this court the original chattel mortgages referred to in Paragraph IV(c) of the complaint, together with the satisfactions of chattel mortgages related thereto.

Dated this 4th day of October, 1957.

/s/ EDWARD P. MURPHY,

Judge of the United States District Court for the District of Idaho.

[Endorsed]: Filed October 5, 1957.

[Title of District Court and Cause.]

MOTION FOR APPOINTMENT OF RECEIVER

Comes Now One of the defendants, Wickahoney Sheep Company, an Idaho corporation, and respectfully moves this Court to appoint a receiver of the property of defendant Wickahoney Sheep Company, as specifically described in the purchase agreement, Exhibit A to the complaint, being the inventory of personal property attached to said purchase agreement as Exhibit B thereto.

This motion is based on the affidavit of Ciriaco Lezamiz attached hereto, the records, files and proceedings in this case, and pursuant to Rule 66 of the Federal Rules of Civil Procedure and Rule 19 of the United States District Court for the District of Idaho.

Dated this 5th day of October, 1957.

HAWLEY & HAWLEY,

By /s/ JESS B. HAWLEY, JR.,
Attorneys for Defendants.

[Title of District Court and Cause.]

AFFIDAVIT

State of Idaho,
County of Ada—ss.

Ciriaco Lezamiz, being first duly sworn, upon his oath deposes and says:

1. That he is over the age of 21 years, a resident of the State of Idaho, ad the duly elected, qualified and acting president of defendant Wickahoney Sheep Company, and the general manager thereof;

2. That in his capacity as general manager of Wickahoney Sheep Company, he is completely familiar with the business of the corporation and its books, records and accounts;

3. That the principal asset of the Wickahoney Sheep Company is the interest of said company in the band of sheep and other personal property, the same being the subject matter of this litigation;

4. That Wickahoney Sheep Company has operated at substantial losses since its organization and the commencement of its business; that at the pres-

ent time defendant Wickahoney Sheep Company is without funds whatever to maintain, preserve and care for the sheep and personal property, and is in an insolvent condition; that at the present time there is a payroll past due and owing to the sheepherders employed by defendant Wickahoney Sheep Company for the purpose of caring for and tending said sheep, in the amount of approximately \$4,-274.59, of which approximately \$900.00 is past due affiant for salary and expenses; that at the present time the cash on hand and in the bank accounts of defendant Wickahoney Sheep Company is approximately \$948.00; that in addition Wickahoney Sheep Company is obligated on promissory notes and equipment contracts in the amount of \$18,-000.00, all of which are due and payable or will become due and payable in the immediate future;

5. That the employees of Wickahoney Sheep Company, and in particular the sheepherders above referred to have threatened to leave the employ of Wickahoney Sheep Company unless their wages are immediately paid, which situation would result in the abandonment of the sheep and other personal property involved in this litigation;

6. That as a direct result of this litigation Wickahoney Sheep Company is unable to obtain the necessary funds to properly care for and preserve the property being the subject of the contract here involved in litigation;

7. Affiant states that Wickahoney Sheep Com-

pany has no quick assets which can be converted to cash for the maintenance, care and preservation of said band of sheep and said property;

8. Affiant states and represents that an emergency exists, requiring the immediate appointment of a receiver of said described property to prevent its abandonment and deterioration and in order to preserve and maintain the same.

/s/ CIRIACO LEZAMIZ.

Subscribed and sworn to before me this 5th day of October, 1957.

[Seal] /s/ M. F. LANE,
Notary Public for Idaho.

Service of Copy acknowledged.

[Endorsed]: Filed October 5, 1957.

[Title of District Court and Cause.]

MINUTE ORDER—OCTOBER 8, 1957

Judge Taylor.

This cause came on regularly this date in open court for hearing on plaintiff's motion to file a supplemental complaint and defendant's motion for appointment of a receiver; Willis Sullivan appearing as counsel for the plaintiffs and Jess B. Hawley, Jr., appearing as counsel for the defendants.

After a discussion between the Court and counsel of the respective parties, both motions were granted. It was stipulated between counsel that they would agree as to whom the receiver shall be and then notify the Court.

[Title of District Court and Cause.]

SUPPLEMENTAL COMPLAINT

Come now the plaintiffs and file this supplement to their Complaint in the above entitled action, and allege as follows:

I.

That subsequent to the time when plaintiffs' Complaint was filed in the above-entitled action, the plaintiffs are informed and believe, and therefore and upon that ground allege the facts to be that defendant, Wickahoney Sheep Company, paid over and delivered to defendant, Bank of Idaho, moneys and funds in excess of the sum of \$100,000.00, the exact amount being unknown to plaintiffs; that all said moneys and funds so paid over and delivered by defendant, Wickahoney Sheep Company, to defendant, Bank of Idaho, were derived from the sale of plaintiffs' wool, sheep and increase and lambs born of said sheep which were being sold by plaintiffs to defendant, Wickahoney Sheep Company, under said purchase agreement, as alleged in plaintiffs' Complaint; that the sale of said wool, sheep and the increase in lambs thereof by defendant,

Wickahoney Sheep Company, was subsequent to the notice of default under said purchase agreement given by plaintiffs to defendant, Wickahoney Sheep Company, and subsequent to the forfeiture of said purchase agreement by plaintiffs, as alleged in plaintiffs' complaint on file herein; that all of said above mentioned facts and circumstances were well known to defendant, Bank of Idaho; that plaintiffs are entitled to have all of said moneys and funds so paid by defendant, Wickahoney Sheep Company, to defendant Bank of Idaho, as aforesaid, paid over and delivered to plaintiffs to satisfy any judgment obtained in this action by plaintiffs against said defendant, Wickahoney Sheep Company.

Wherefore, plaintiffs pray that other and further relief be granted to them as follows:

That plaintiffs have judgment against defendant, Bank of Idaho, for all moneys and funds paid over and delivered to it by defendant, Wickahoney Sheep Company, which moneys and funds were derived from the sale of plaintiffs' sheep and the lambs and increase thereof, and that defendant, Bank of Idaho, be held to account to plaintiffs for all said moneys and funds.

/s/ W. H. LANGROISE,

/s/ W. E. SULLIVAN,

Attorneys for Plaintiffs.

Service of Copy acknowledged.

[Endorsed]: Filed October 11, 1957.

[Title of District Court and Cause.]

ORDER APPOINTING RECEIVER

This matter having come on for hearing before the above-entitled court, at 3:30 p.m., on the 8th day of October, 1957, on the motion of the defendant Wickahoney Sheep Company for appointment of a receiver, Jess B. Hawley, Jr., of Hawley & Hawley appearing for the defendant Wickahoney Sheep Company, and W. E. Sullivan of Langroise and Sullivan appearing for the plaintiffs, and the Court having heard argument and considered the matter, and good cause appearing therefor;

It Is Hereby Ordered:

1. That the motion of defendant Wickahoney Sheep Company for appointment of a receiver should be and the same is hereby granted, and Blaine Austin, Elko, Nevada, is hereby appointed receiver in the above-entitled action, and he shall, before entering upon the discharge of his duties, file with the clerk of this Court a good and sufficient surety bond, to be approved by this Court, in the penalty of \$5,000.00.

2. Immediately after his qualification, said Blaine Austin shall, as receiver, take possession of all of the property of the defendant Wickahoney Sheep Company, and shall accurately inventory the same and file a copy of said inventory with the Court. Said receiver is directed to operate and conduct the business of defendant Wickahoney

Sheep Company to the extent necessary to conduct and preserve the same in like condition as at the present, and subject to the further order of this Court.

Dated this 9th day of October, 1957.

/s/ FRED M. TAYLOR,
Judge of the United States District Court for the
District of Idaho.

[Endorsed]: Filed October 11, 1957.

[Title of District Court and Cause.]

RECEIPT FOR DOCUMENTS DEPOSITED IN REGISTRY OF COURT

Pursuant to order heretofore entered in the above-entitled proceedings, authorizing the deposit in the registry of the Court of certain documents by defendant Bank of Idaho, receipt is hereby acknowledged by the clerk of the above-captioned Court of the following documents from defendant Bank of Idaho this 11th day of October, 1957, to wit:

Item 1: Original escrow agreement dated December 15, 1955, by and between C. A. Sewell and Orene H. Sewell as grantors and Wickahoney Sheep Company as grantee, and Continental State Bank as escrow holder.

Item 2: Original executed copy of purchase

agreement dated December 15, 1955, by and between C. A. Sewell and Orene H. Sewell as sellers and Wickahoney Sheep Company as purchaser.

Item 3. Bill of sale, together with inventory attached thereto and made a part thereof, by and between C. A. Sewell and Orene H. Sewell, parties of the first part, and Ruby Company as party of the second part.

Item 4: Executed copy of assignment of purchase agreement dated December 15, 1955, by and between C. A. Sewell and Orene H. Sewell as assignors and Orville R. Wilson as assignee.

Item 5: Chattel mortgage dated September 17, 1956, from Wickahoney Sheep Company to Continental State Bank, in the amount of \$50,000, showing release and satisfaction thereof as of August 27, 1957.

Item 6: Chattel mortgage dated November 1, 1956, from Wickahoney Sheep Company to Continental State Bank, in the amount of \$50,000, showing release and satisfaction thereof as of August 27, 1957.

Item 7: Chattel mortgage dated November 27, 1956, from Wickahoney Sheep Company to Continental State Bank, in the amount of \$65,000, showing release and satisfaction thereof as of August 27, 1957.

Item 8: Chattel mortgage dated January 5, 1957, from Wickahoney Sheep Company to Continental

State Bank, in the amount of \$100,000, showing release and satisfaction thereof as of August 27, 1957.

Dated this 11th day of October, 1957.

/s/ ED M. BRYAN,
Clerk.

[Endorsed]: Filed October 11, 1957.

[Title of District Court and Cause.]

BOND OF RECEIVER

Know All Men by These Presents:

That I, Blaine Austin, as Principal, and United States Fidelity and Guaranty Company, a corporation authorized to transact a surety business in the State of Idaho, as Surety, are hereby firmly held and bound unto the District Court of the United States for the District of Idaho, Southern Division and unto the plaintiff and unto the defendant in this action, in the sum of Five Thousand (5,000.00) Dollars, for the payment of which sum well and truly to be made we hereby bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally firmly by these presents.

Dated this ninth day of October, 1957.

Whereas, by an order in the above-named case issued by the District Court of the United States

for the District of Idaho, Southern Division, and dated the ninth day of October, 1957, the above-named principal, Blaine Austin, was appointed receiver to take charge and possession of the property of the defendant corporation and is in the order appointed said receiver more specifically set forth and hereby referred to upon his filing a bond in the sum of \$5,000.00.

Now, Therefore, If the said Blaine Austin, as such receiver shall faithfully discharge the duties of such receiver in the said action and obey the orders of the court therein, then this obligation shall be void, otherwise it shall remain in full force and effect.

In Witness Whereof, the said principal has executed this bond and United States Fidelity and Guaranty Company has caused this bond to be executed by its agent at Boise, Idaho.

/s/ BLAINE AUSTIN,
Principal.

[Seal] UNITED STATES FIDELITY
& GUARANTY CO.,

By /s/ JAMES W. PERRY,
Attorney-in-Fact.

Countersigned:

/s/ JAMES W. PERRY AGENCY,
Boise, Idaho.

[Endorsed]: Filed October 14, 1957.

[Title of District Court and Cause.]

OATH OF RECEIVER

State of Idaho,
County of Ada—ss.

I, Blaine Austin, do solemnly swear that I will faithfully and impartially discharge and perform all of the duties incumbent upon me as receiver in the above-entitled action, according to the best of my abilities and understanding, and in accordance with the requirements of the Constitution and the laws of the United States, so help me God.

/s/ BLAINE AUSTIN.

Subscribed and sworn to before me this 9th day of October, 1957.

[Seal] ED M. BRYAN,
Clerk of the United States District Court for the
District of Idaho,

By /s/ PAUL BOYER.

[Edorsed]: Filed October 14, 1957.

[Title of District Court and Cause.]

INTERROGATORIES TO DEFENDANT WICKAHONEY SHEEP COMPANY

To Wickahoney Sheep Company, one of the above-named Defendants:

You Are Hereby Notified to answer, under oath, the interrogatories of the above-named plaintiffs set forth below, within fifteen (15) days of the time service is made upon you, in accordance with Rule 33 of the Federal Rules of Civil Procedure:

Interrogatory No. 1: Did Wickahoney Sheep Company borrow any money from the Bank of Idaho (formerly Continental State Bank), since October 18, 1955, and if so, in what amounts, and on what dates?

Interrogatory No. 2: Describe in detail all security which Wickahoney Sheep Company gave to the Bank of Idaho for all loans by the Bank of Idaho to Wickahoney Sheep Company since October 18, 1955.

Interrogatory No. 3: Describe in detail all other security given for said loans described in Interrogatory No. 1 other than security given by Wickahoney Sheep Company, and by whom each such other security given.

Interrogatory No. 4: Were any of the loans made by the Bank of Idaho to Wickahoney Sheep Company guaranteed by any other person, firm, association, partnership, or corporation, and if so, the names of such guarantors?

Interrogatory No. 5: For what purposes did Wickahoney Sheep Company use any and all moneys borrowed by it from the Bank of Idaho?

Interrogatory No. 6: Has Wickahoney Sheep

Company borrowed any moneys from any other person, firm, association, partnership, or corporation, other than the Bank of Idaho, since October 18, 1955, and if so, from whom, and on what dates, and in what amounts?

Interrogatory No. 7: Describe in detail all security given for said loans mentioned in Interrogatory No. 6, and by whom was such security given.

Interrogatory No. 8: If Wickahoney Sheep Company borrowed any moneys described in Interrogatory No. 6, for what purpose did Wickahoney Sheep Company use said moneys?

Interrogatory No. 9: Have any loans, or any part thereof, made by the Bank of Idaho, or any other person, firm, association, partnership or corporation to Wickahoney Sheep Company been paid, and if so, by whom, and in what amounts, and on what dates?

Interrogatory No. 10: If Wickahoney Sheep Company has paid any of the loans, or any part thereof, as set forth in Interrogatory No. 9, from what source did Wickahoney Sheep Company obtain the moneys to make such payments?

Interrogatory No. 11: Have any of the ewes or bucks being sold to Wickahoney Sheep Company by the plaintiffs under that certain purchase agreement dated December 15, 1955, between C. A. Sewell and Orene H. Sewell, husband and wife, and Wickahoney Sheep Company, a copy of which purchase

agreement is attached to the complaint in this action as Exhibit A, or any of the lambs or increase thereof, or any of the wool obtained from the same been sold, and if so, what was sold, and to whom, and on what dates, and what was the sale price for each of said sales?

Interrogatory No. 12: What use did Wickahoney Sheep Company make of all the funds received from the sales described in Interrogatory No. 11, and to whom were said funds expended, and in what amounts, and on what dates?

Interrogatory No. 13: Describe by their ages all the ewes and bucks, and the lambs and increase thereof, being sold to Wickahoney Sheep Company under said purchase agreement, a copy of which is attached to the complaint in this action as Exhibit A, which now remain in the possession or under the control of Wickahoney Sheep Company, or the receiver appointed in this action?

Interrogatory No. 14: Has that certain lease dated October 18, 1955, between C. A. Sewell and Orene H. Sewell, as lessors, and Wickahoney Sheep Company, as lessee, and the modification of said lease dated December 15, 1955, been assigned by Wickahoney Sheep Company to the Ruby Company, a Utah corporation, and if so, does said Ruby Company still hold said lease and modification of lease as assignee? What compensation, if any, was paid by Ruby Company to Wickahoney Sheep Company for said assignment?

Interrogatory No. 15: Has the Ruby Company ever loaned any money to Wickahoney Sheep Company since October 18, 1955, and if so, what amounts, and on what dates, and what was the security for said loans?

Interrogatory No. 16: If the Ruby Company ever loaned any money to Wickahoney Sheep Company since October 18, 1955, have any of said loans, or any part thereof, been repaid, and if so, in what amounts, and on what dates?

Interrogatory No. 17: Has Wickahoney Sheep Company loaned any moneys to Ruby Company since October 18, 1955, and if so, the amount of said loans, and the dates thereof, and what security was given therefor?

Interrogatory No. 18: If Wickahoney Sheep Company made any loans to Ruby Company, as set forth in the preceding Interrogatory, have any of said loans been paid, or any part thereof been repaid, and if so, in what amounts, and on what dates?

Interrogatory No. 19: Describe in detail all contracts and agreements entered into between the Wickahoney Sheep Company and the Ruby Company since October 18, 1955.

Interrogatory No. 20: Who have been the officers and directors of Wickahoney Sheep Company during the period from October 18, 1955, to the present time?

Interrogatory No. 21: Who have been the stockholders of Wickahoney Sheep Company during the period from October 18, 1955, to the present time, and how many shares of the common stock of Wickahoney Sheep Company have been, and now are, owned by each of said stockholders?

Interrogatory No. 22: Are any of the stockholders of Wickahoney Sheep Company also stockholders of Ruby Company?

Interrogatory No. 23: Does Wickahoney Sheep Company own any sheep, or is it purchasing any sheep, on contract, or otherwise, other than the ewes and bucks, and the lambs and increase thereof, described in the purchase agreement dated December 15, 1955, between C. A. Sewell and Orene H. Sewell, husband and wife, as sellers, and Wickahoney Sheep Company, as purchaser, a copy of which purchase agreement is attached to the complaint in this action as Exhibit A, and if so, a detailed description of such sheep?

LANGROISE & SULLIVAN,
Attorneys for Plaintiffs.

Service of Copy acknowledged.

[Endorsed]: Filed October 22, 1957.

[Title of District Court and Cause.]

INTERROGATORIES TO DEFENDANT,
BANK OF IDAHO

To Bank of Idaho, one of the above-named Defendants:

You Are Hereby Notified to answer, under oath, the interrogatories of the above-named plaintiffs set forth below, within fifteen (15) days of the time service is made upon you, in accordance with Rule 33 of the Federal Rules of Civil Procedure:

Interrogatory No. 1: What loans were made by the Bank of Idaho (formerly Continental State Bank) to Wickahoney Sheep Company, since October 18, 1955, and the amount of said loans, and the dates on which said loans were made?

Interrogatory No. 2: Describe in detail all security given for said loans referred to in Interrogatory No. 1.

Interrogatory No. 3: Were any of said loans to Wickahoney Sheep Company referred to in Interrogatory No. 1 guaranteed by any person, firm, association, partnership or corporation, and if so, by whom?

Interrogatory No. 4: Did the Bank of Idaho inform the plaintiffs, or any of them, of said loans made by it to Wickahoney Sheep Company?

Interrogatory No. 5: For what purpose were loans made by the Bank of Idaho to Wickahoney

Sheep Company, and what use did Wickahoney Sheep Company make of said moneys so loaned to it?

Interrogatory No. 6: Have the loans made by the Bank of Idaho to Wickahoney Sheep Company been paid, or any part thereof, and if so, by whom were said payments made, and on what dates?

Interrogatory No. 7: If any of said loans, or any part thereof, made by the Bank of Idaho to Wickahoney Sheep Company have been paid by Wickahoney Sheep Company, from what source did Wickahoney Sheep Company obtain the money to make such payments?

Interrogatory No. 8: Did the Bank of Idaho ever obtain possession or control of any property given as security to the Bank of Idaho for loans made by it to Wickahoney Sheep Company, and if so, what disposition was made by the Bank of Idaho of such property?

LANGROISE & SULLIVAN,
Attorneys for Plaintiffs.

[Endorsed]: Filed October 22, 1957.

[Title of District Court and Cause.]

INVENTORY OF RECEIVER

Comes Now the receiver in the above-entitled action and submits herewith to this Honorable Court

his Inventory of all of the assets of defendant, Wickahoney Sheep Company, which have been discovered by him. Said assets are set forth in Exhibit A, attached hereto and by reference made a part hereof.

In addition to the assets listed on said Exhibit A, there is also funds of defendant, Wickahoney Sheep Company, on deposit in the Bank of Idaho at Boise, Idaho, the amount of which is presently unknown; and there is also a U. S. Government Wool Subsidy, the amount of which is presently unknown.

/s/ BLAINE AUSTIN,
Receiver.

EXHIBIT A

- 1—McCormick #13652 400 Tractor.
- 1—McCormick 2-Way Tractor Plow #34F21.
- 1—McCormick Disk (Tractor).
- 1—1951 Chev. Pickup Motor #JBA753268
Ser. #6PJPF10512.
- 200 Water Tubs.
- 12 Water Troughs.
- 1—Portable 1600 ga. tank.
- 1—Farmhand heavy duty.
- 1—McCormick Power Mower.
- 2—Stone Boats.
- 1—Harrow.
- 1—Hookup to carry things on tractor (spray).

- 1—Corrugator (tractor).
- 1—McCormick side delivery rake.
- 1—McCormick Loader.
- 2—Chopped hay racks.
- 1—Full set harrows.
- 1—Chattin ditcher.
- 1—McCormick 400 Manure Spreader.
- 2—Wagon Running Gears.
- 1—Handy-Way Bale Loader and Conveyor.
- 1—1200 gal. Portable Tank.
- 1—Bearcat Chopper (hay).
- 50 T. Chopped Hay.
- 1—Derrick.
- 1—Grain Tank (1800).
- 1800 bu. Oats.
- 250 bales Straw.
- 12—Lambing Shed Canvas.
- 1—500 gal. Portable Tank.
- 5—Camp Wagons.
- 4—Commissary Wagons.
- 6—Sets Harness.
- 6—Saddles.
- 200 Panels (lumber).
- 1—Wisconsin Water Pump and Motor.
- Miscellaneous Equipment.
- 550 tons Hay (estimate).
- 1—Heater.
- 1—Deep Freeze (G.E.).
- 1—Pressure System in house.
- 1—Electric Range (Hotpoint).
- 1—Electric Refrigerator.
- 1—Dining Table.

2—Benches.

Misc. Dishes.

1—Arc Welder.

1955 Chevrolet 2-Ton Truck.

Livestock

44 Bucks.

100 Small Lambs.

3187 Ewes.

8 Work Horses.

8 Saddle Horses.

1 Milk Cow.

1 Yearling.

Service of copy acknowledged.

[Endorsed]: Filed October 25, 1957.

[Title of District Court and Cause.]

STIPULATION FOR SALE OF PROPERTY

It Is Hereby Stipulated and Agreed by and between all of the parties in the above-entitled action that the above-entitled court may authorize and direct the Receiver in the above-entitled action to sell all of the livestock of defendant, Wickahoney Sheep Company, including, but not limited to, the following: 44 bucks, 100 small lambs, 3187 ewes, 8 work horses, 8 saddle horses, 1 milk cow, and 1 yearling.

And Further that the sale of said livestock shall be for the best price obtainable by the Receiver,

and may be either at public or private sale, and in such lots or quantities as the Receiver in his discretion may determine.

LANGROISE & SULLIVAN,

By /s/ W. E. SULLIVAN,
Attorneys for Plaintiffs.

HAWLEY & HAWLEY,

By /s/ JESS B. HAWLEY, JR.,
Attorneys for Defendants.

[Endorsed]: Filed October 26, 1957.

[Title of District Court and Cause.]

ORDER FOR SALE OF PROPERTY

Pursuant to the Stipulation of the parties in the above-entitled action on file herein,

It Is Hereby Ordered that the Receiver in the above-entitled action is hereby authorized and directed to sell all of the livestock of defendant, Wickahoney Sheep Company, including, but not limited to the following: 44 bucks, 100 small lambs, 3187 ewes, 8 work horses, 8 saddle horses, 1 milk cow, and 1 yearling.

And It Is Further Ordered that the sale of said livestock shall be for the best price obtainable by the Receiver, and may be either at public or private

sale, and in such lots and quantities as the Receiver may in his discretion determine.

Dated: October 26, 1957.

/s/ FRED M. TAYLOR,
Judge, U. S. District Court.

[Endorsed]: Filed October 26, 1957.

[Title of District Court and Cause.]

OBJECTIONS TO INTERROGATORIES

Comes Now the defendant, Wickahoney Sheep Company, and objects to the following designated interrogatories served on said defendant by the plaintiffs in the above-entitled action:

Interrogatories Numbered 3, 4, 5, 6, 7, 8, 14, 15, 16, 17, 18 19 and 22.

Objection is made to the aforesaid interrogatories upon the grounds and for the reasons that the same are immaterial and irrelevant and do not tend to prove or disprove any of the issues involved in this litigation; that the Ruby Company is not a party defendant in said action; that the demand of the plaintiffs is limited to the return of the property covered by the purchase agreement, or the sum of \$225,100.00 from defendant, Wickahoney Sheep Company, and an accounting from defendant, Bank of Idaho, of monies paid to it by defendant, Wick-

ahoney Sheep Company, derived from the sale of the sheep, being the subject matter of the contract.

HAWLEY & HAWLEY,

By /s/ JESS B. HAWLEY, JR.,

Attorneys for defendant,
Wickahoney Sheep Co.

Service of copy acknowledged.

[Endorsed]: Filed November 1, 1957.

[Title of District Court and Cause.]

OBJECTIONS TO INVENTORY
OF RECEIVER

Come Now The Defendants, and object to the inclusion of the following items to the inventory of the receiver filed herein upon the grounds and for the reasons that the items set forth herein and objected to are not included in or are they a part of the purchase agreement, Exhibit A to the complaint on file herein; that said items are subject to a chattel mortgage, made and entered into between Wickahoney Sheep Company as mortgagor and First Security Bank of Idaho, N.A., on or about the 21st day of August, 1957; that said items objected to are not subject to the receivership:

1—McCormick No. 13652 400 Tractor.

1—McCormick 2-way Tractor Plow No. 34F21.

1—McCormick Disk (tractor).

- 1—1951 Chevrolet Pickup, Motor No. JBA 753268, Serial No. 6PJPF10512.
- 1—Farmhand heavy duty.
- 1—McCormick Power Mower.
- 1—Harrow.
- 1—Corrugator (tractor).
- 1—McCormick side delivery rake.
- 1—McCormick Loader.
- 1—Chattin Ditcher.
- 1—McCormick 400 Manure Spreader.
 - 1,800 bu. oats.
 - 550 tons hay (estimate).
- 1—Deep Freeze (G.E.).
- 1—Electric Refrigerator.
- 1—Arc Welder.
- 1—1955 Chevrolet 2-ton truck (Replaced 1954 1½-ton International).

Dated this 31st day of October, 1957.

HAWLEY & HAWLEY,

By /s/ JESS B. HAWLEY, JR.,
Attorneys for Defendants.

Service of copy acknowledged.

[Endorsed]: Filed November 1, 1957.

[Title of District Court and Cause.]

OBJECTION TO INTERROGATORY

Comes Now the Bank of Idaho, and objects to Interrogatory No. 3 which reads as follows:

“Were any of said loans to Wickahoney Sheep Company referred to in Interrogatory No. 1 guaranteed by any person, firm, association, partnership or corporation, and if so, by whom?”

on the ground that the information sought under said Interrogatory is entirely foreign to the issues of the above entitled case, and can have no bearing whatsoever on the issues raised by the pleadings herein; that the demand of the Plaintiffs is limited to the return of the property covered by the purchase agreement, or the sum of \$225,100.00 from Defendant Wickahoney Sheep Company, and an accounting from Defendant Bank of Idaho of monies paid to it by Defendant Wickahoney Sheep Company derived from the sale of the sheep, being the subject matter of the contract.

Dated: November 1st, 1957.

HAWLEY & HAWLEY,

By /s/ JESS B. HAWLEY.

ELAM AND BURKE,

By /s/ LAUREL E. ELAM,

Attorneys for Bank of Idaho.

Service of copy acknowledged.

[Endorsed]: Filed November 1, 1957.

[Title of District Court and Cause.]

ANSWERS TO INTERROGATORIES
BY BANK OF IDAHO

State of Idaho,
County of Ada—ss.

Comes Now Bank of Idaho, and under oath gives the following answers to the interrogatories submitted.

Interrogatory No. 1:

Answer: Reference is made to schedule attached, showing loans made by Bank of Idaho (formerly Continental State Bank) to Wickahoney Sheep Company since October 18, 1955.

Interrogatory No. 2:

Answer: Security given for said loans referred to in Interrogatory No. 1 consists of chattel mortgages now on file with the Court, and fully described in Receipt for Documents deposited in registry of Court, dated October 11, 1957.

Interrogatory No. 3:

Answer: Objection has been filed with the Court in connection with this Interrogatory under date of November 1, 1957.

Interrogatory No. 4:

Answer: The Bank of Idaho did not inform the Plaintiffs, or any of them, of said loans made by it to Wickahoney Sheep Company, excepting as

to the recording of chattel mortgages described in Receipt for Documents deposited in Registry of Court under date of October 11, 1957.

Interrogatory No. 5:

Answer: Loans made by the Bank of Idaho to Wickahoney Sheep Company were made for the purpose to provide operating capital for the company. The Bank of Idaho has no knowledge of what use the Wickahoney Sheep Company made of said monies so loaned to it.

Interrogatory No. 6:

Answer: All loans made by the Bank of Idaho to Wickahoney Sheep Company have been paid. Reference is made to Schedule of Loans attached for answer to the question "By whom were said payments made, and on what dates."

Interrogatory No. 7:

Answer: Reference is made to the Schedule of Loans attached to show how payment was made by Wickahoney Sheep Company and from what sources Wickahoney Sheep Company obtained the money to the extent such information is available from the records of the **Bank of Idaho**.

Interrogatory No. 8:

Answer: No.

BANK OF IDAHO,

By /s/ **JAMES BYERS,**
Sr. Vice President.

Subscribed and sworn to by James Byers before
me this 4th day of November, 1957.

[Seal] /s/ LAUREL E. ELAM,
Notary Public for Idaho,
Residing at Boise, Idaho.

HAWLEY & HAWLEY,
By /s/ JESS B. HAWLEY.

ELAM AND BURKE,
By /s/ LAUREL E. ELAM,
Attorneys for Bank of Idaho.

Schedule of Loans Made to Wickahoney Sheep Company
Since October 18, 1955, and Source of Payment for Such Loans

Loan No.	Date Made	Amount	Date Paid	Source of Payment
4452	10/17/55	\$20,000.00	6/14/56	Renewal
4477	10/20/55	20,000.00	1/21/56	Renewal
4570	11/ 1/55	10,000.00	1/21/56	Renewal
4746	11/28/55	10,000.00	1/21/56	Renewal
5090	1/ 7/56	10,000.00	6/15/56	Renewal Larger
5159	1/13/56	15,000.00	6/14/56	Renewal Larger
5217	1/21/56	40,000.00	6/15/56	Renewal Larger
5297	2/ 4/56	5,000.00	6/14/56	Renewal Larger
6459	5/ 9/56	20,000.00	6/14/56	Renewal Larger

0	6/14/56	50,000.00	7/20/56	\$30,000.00 paid on account with check of Wickahoney Sheep Co. drawn on Bank of Idaho
			9/18/56	\$20,000.00 Renewal Larger
1	6/15/56	50,000.00	8/ 9/56	\$20,000.00 paid on account with check of Wickahoney Sheep Co. drawn on Bank of Idaho
			9/18/56	\$30,000.00 Renewal Larger
6	9/17/56	50,000.00	11/ 5/56	Renewal
4	11/ 5/56	50,000.00	11/27/56	Renewal Larger
5	11/27/56	65,000.00	1/ 5/57	Renewal Larger
1	1/ 5/57	100,000.00	See Schedule	See Schedule



Check No.

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Schedule of Payments Received on Loan No. 8191, Dated 1/5/57, in the amount of \$100,000.00

Check No.	Date	Maker	Payee	Drawee	Endorsement	Amount	Payment A/C Int.	Payment A/C Prin.
5167	7/ 2/57	John Clay & Co.	Wickahoney Sheep Co.	Ogden Branch 1st Sec. Bank of Ogden	Pay to Bank of Idaho Wickahoney Sheep Co. By Ciriaco Lezamiz, President	\$25,713.31	\$ 2,734.72	\$22,978.59
1110	7/ 6/57	John Clay & Co.	Wickahoney Sheep Co.	Ogden Branch 1st Sec. Bank of Ogden	Pay to Bank of Idaho Wickahoney Sheep Co. By John M. Dahl, Treasurer	22,357.13	82.37	22,274.76
62173809	7/17/57	Commodity Credit Corp Sight Draft	Wickahoney Sheep Co.	Fed. Res. Bank	Pay to Bank of Idaho Wickahoney Sheep Co. By John M. Dahl Treasurer	2,866.51		
62173833	7/22/57	Commodity Credit Corp Sight Draft	Wickahoney Sheep Co.	Fed. Res. Bank	Pay to Bank of Idaho Wickahoney Sheep Co. By John M. Dahl Treasurer	11,704.11 <hr/> 14,570.62	133.83	14,436.79
5174	8 11 57	John Clay & Co.	Wickahoney Sheep Co.	Ogden Branch 1st Sec. Bank of Ogden	Credited to the acct. of Wickahoney Sheep Co. Bank of Idaho	24,470.38	129.33	24,341.05
	8 22/57	Wickahoney Sheep Co	Bank of Idaho	Bank of Idaho	Un-endorsed Account credited	2,441.77		
661	8 15 57	Swift & Company	Wickahoney Sheep Co.	Swift & Co. draft thru Commercial Sec. Bank of Ogden	Stamp endorsement obliterated	700.00		
671	8 21 57	Swift & Company	Wickahoney Sheep Co.	Swift & Co. draft thru Commercial Sec. Bank of Ogden	Credited to the acct. of Wickahoney Sheep Co. Bank of Idaho	11,169.68		
	8 5, 57	Western Idaho Production Credit Assn.	Wickahoney Sheep Co. (As Seller)	Western Idaho Production Credit Assn. Draft	Harvey Groefsmma (Buyer)	1,672.00 <hr/> 15,983.45	14.61	15,968.81

Service of copy acknowledged.

[Endorsed]: Filed November 4, 1957.

[Title of District Court and Cause.]

ANSWERS TO INTERROGATORIES

Comes Now the Defendant Wickahoney Sheep Company and, in response to the interrogatories directed to Defendant pursuant to Rule 33, Federal Rules of Civil Procedure, makes the following answers to the said interrogatories:

Answer to Interrogatory No. 1: Wickahoney Sheep Company borrowed money from the Bank of Idaho in the following amounts and on the following dates:

Loan #	Date Made	Amount	Date Paid
4477	10/20/55	\$ 20,000.00	1/21/56
4570	11/ 1/55	10,000.00	1/21/56
4746	11/28/55	10,000.00	1/21/56
5090	1/ 7/56	10,000.00	6/15/56
5159	1/13/56	15,000.00	6/14/56
5217	1/21/56	40,000.00	6/15/56
5297	2/ 4/56	5,000.00	6/14/56
6459	5/ 9/56	20,000.00	6/14/56
6660	6/14/56	50,000.00	7/20/56
6661	6/15/56	50,000.00	8/ 9/56
7376	9/17/56	50,000.00	11/ 5/56
7694	11/ 5/56	50,000.00	11/27/56
7885	11/27/56	65,000.00	1/ 5/57
8191	1/ 5/57	100,000.00	Paid in installments final payment 8/5/57

Answer to Interrogatory No. 2: The security given by Wickahoney Sheep Company to the Bank of Idaho, securing the loans described in Answer to Interrogatory No. 1, are as follows:

1. Chattel mortgage, recording No. 94875, dated September 17, 1956, in the amount of \$50,000.00;
2. Chattel mortgage, recording No. 94975, dated November 1, 1956, in the amount of \$50,000.00;

3. Chattel mortgage, recording No. 95070, dated November 27, 1956, in the amount of \$65,000.00;

4. Chattel mortgage, recording No. 95318, dated January 5, 1957, in the amount of \$100,000.00.

The original chattel mortgages hereinabove set forth, together with the satisfactions thereof, have been deposited in the registry of this Court, pursuant to order thereof.

Answer to Interrogatories No. 3 through 8 inclusive: Objection thereto heretofore filed with the Court on or about October 31, 1957.

Answer to Interrogatory No. 9: Answered by answer to Interrogatory No. 1.

Answer to Interrogatory No. 10: Wickahoney Sheep Company obtained the monies from the sale of sheep, wool and lambs.

Answer to Interrogatory No. 11: See Exhibit A attached hereto and made a part of this answer, the same being designated "Summary of Sales."

Answer to Interrogatory No. 12: In addition to the payments made to Bank of Idaho, referred to in the Answer to Interrogatory No. 1, the funds referred to were expended generally for expenses incurred in the operation of the business of Wickahoney Sheep Company. The supplying of the detail in connection with said expenditures will entail a complete and itemized audit of the books of Defendant corporation, it being impossible to complete said audit and furnish said figures within the time limit herein required for these interrogatories.

Answer to Interrogatory No. 13:

Ewes, 9 years and older.....	791
Ewes, approximately 3 years.....	450
Ewes, approximately 4 years.....	275
Ewes, 5 and 6 years.....	1,671
Small lambs	100
Bucks	44

Total 3,331

Answer to Interrogatories No. 14 through 19 inclusive: Objection thereto heretofore filed with the Court on or about October 31, 1957.

Answer to Interrogatory No. 20:

Directors: Ciriaco Lezamiz, L. E. Haight, John M. Dahl.

Officers: Ciriaco Lezamiz, President; L. E. Haight, Vice-President; John M. Dahl, Secretary-Treasurer.

Answer to Interrogatory No. 21: 100 shares of the common stock, being all of the outstanding and issued shares thereof, were issued at date of incorporation to Ciriaco Lezamiz, which stock was subsequently sold and transferred to the Ruby Company.

Answer to Interrogatory No. 22: Objection thereto heretofore filed with the Court on or about October 31, 1957.

Answer to Interrogatory No. 23: No.

HAWLEY & HAWLEY,

By /s/ JESS B. HAWLEY, JR.,

Attorneys for Defendant,
Wickahoney Sheep Co.



[Title of District Court and Cause.]

MOTION OF RECEIVER FOR DELIVERY
OF DOCUMENTS

Comes Now Blaine Austin, the Receiver in the above-entitled action, and moves this Honorable Court for an order directing, instructing and ordering defendant, Wickahoney Sheep Company, and the officers thereof, immediately to turn over and deliver to said Receiver all of the books, records, documents, financial statements, books of account, check registers, cancelled checks, and deposit slips, contracts, and all other instruments concerning, dealing with, evidencing or representing all financial transactions of the defendant, Wickahoney Sheep Company.

Dated: November 19, 1957.

/s/ BLAINE AUSTIN,
Receiver.

Service of copy acknowledged.

[Endorsed]: Filed November 20, 1957.

[Title of District Court and Cause.]

NOTICE OF HEARING

To: Hawley & Hawley, Attorneys for Defendants,
and to Elam & Burke, Attorneys for Defendant,
Bank of Idaho.

Please Take Notice That the undersigned will

bring on for hearing before this court the Objections of Defendants to Inventory of Receiver, the Objections of Defendant, Wickahoney Sheep Company, to Interrogatories, the Objection of Bank of Idaho to Interrogatory, and the Motion of Receiver for Delivery of Documents, in the courtroom of the above-entitled court in the Federal Building, Boise, Idaho, on Wednesday the 27th day of November, 1957, at 11:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

Dated: November 20, 1957.

LANGROISE & SULLIVAN,

By /s/ W. E. SULLIVAN,

Attorneys for Plaintiffs.

Service of copy acknowledged.

[Endorsed]: Filed November 20, 1957.

[Title of District Court and Cause.]

ANSWER TO SUPPLEMENTAL COMPLAINT

Come Now The defendants, and in answer to the supplemental complaint in the above-entitled action, admit, deny and allege as follows:

I.

Answering Paragraph I, defendants deny each and every allegation therein.

As a first defense and second defense to said supplemental complaint, defendants incorporate herein by reference the first and second defenses to the

original complaint on file herein, as though set out herein in haec verba.

For a third defense, defendants allege that any monies received by defendant Bank of Idaho from or for the account of Wickahoney Sheep Company were in payment of valid and subsisting promissory notes of Wickahoney Sheep Company, secured by chattel mortgages for loans made by defendant Bank of Idaho to defendant Wickahoney Sheep Company; that said chattel mortgages were valid and subsisting obligations of defendant Wickahoney Sheep Company, and payment thereof was authorized by law, and by established certain and general custom.

Wherefore, Defendants Pray That plaintiffs take nothing by virtue of their supplemental complaint on file herein, and that defendants be hence dismissed with their costs in this action necessarily incurred.

HAWLEY & HAWLEY,

By /s/ JESS B. HAWLEY,

Attorneys for Defendant Wickahoney Sheep Company.

ELAM & BURKE,

HAWLEY & HAWLEY,

By /s/ JESS B. HAWLEY,

Attorneys for Defendant
Bank of Idaho.

Affidavit of mail attached.

[Endorsed]: Filed November 22, 1957.

[Title of District Court and Cause.]

MOTION

Comes Now The defendant Wickahoney Sheep Company, an Idaho corporation, and respectfully moves the Court that the order appointing receiver, heretofore filed and entered in the above proceedings on or about October 9, 1957, be amended and qualified to permit the receiver to take possession of only so much of the property of said defendant as is referred to in and covered by the purchase agreement between the plaintiffs C. A. Sewell and Orene H. Sewell and defendant Wickahoney Sheep Company, the same being Exhibit A to the complaint on file herein.

This Motion Is based upon the records and files in this proceedings, and the affidavit of Jess B. Hawley, Jr., attached hereto and made a part hereof.

Dated this 21st day of November, 1957.

HAWLEY & HAWLEY,

By /s/ JESS B. HAWLEY,
Attorneys for Defendant Wickahoney Sheep Company.

AFFIDAVIT

State of Idaho,
County of Ada—ss.

Jess B. Hawley, Jr., being first duly sworn, deposes and says:

That he is acting in the above proceedings as attorney for defendant Wickahoney Sheep Company; that for and on behalf of said Wickahoney Sheep Company he moved for appointment of a receiver on October 5, 1957, said motion being limited to the appointment of a receiver for the property of defendant Wickahoney Sheep Company as specifically described in the purchase agreement, Exhibit A to the complaint; that thereafter, after hearing before the above-entitled Court on October 8, 1957, the Court granted defendant's motion for appointment of a receiver, and requested affiant to prepare an order in conformance therewith; that, through inadvertence, the order appointing the receiver herein, and as prepared by affiant, authorized the receiver to "take possession of all of the property of the defendant Wickahoney Sheep Company," instead of being limited to the property of said defendant as covered by Exhibit A to the complaint on file; that said order should be amended in accordance with this motion to reflect the proper ruling of this Court, and to correct the inadvertence of counsel.

Further affiant saith not.

/s/ JESS B. HAWLEY, JR.

Subscribed and sworn to before me this 21st day of November, 1957.

[Seal] /s/ M. F. LANE,
Notary Public for Idaho.

Affidavit of mail attached.

[Endorsed]: Filed November 22, 1957.

[Title of District Court and Cause.]

MINUTE ORDER—NOVEMBER 29, 1957

Judge Taylor.

This cause came on regularly this date in open court for hearing on motions and objections to interrogatories, W. E. Sullivan, appearing as counsel for the plaintiffs, Jess B. Hawley, Jr., appearing as counsel for the defendant, Wickahoney Sheep Company, and Laurel Elam appearing as counsel for the defendant, Bank of Idaho.

After a discussion between the Court and counsel for the respective parties, it was ordered that the motion to amend order appointing receiver be denied, the objections to inventory of receiver be denied, the objections to interrogatories of both defendants be taken under advisement, and the motion of receiver for delivery of documents be granted with the reservation that the receiver may have access to the documents, but they are not to be turned over to him.

[Title of District Court and Cause.]

ORDER

The motion of Blaine Austin, the Receiver in the above-entitled action, for the delivery of documents coming on regularly to be heard on the 29th day of November, 1957, said Receiver being represented by his attorney, W. E. Sullivan, and the plaintiffs being represented by W. E. Sullivan of the firm of Langroise & Sullivan, and the defendants being represented by Jess B. Hawley of the firm of Hawley & Hawley, and the defendant, Bank of Idaho being represented by Laurel E. Elam of the firm of Elam & Burke, and the court having heard arguments of counsel, and duly considered the same.

It Is Hereby Ordered That defendant, Wickahoney Sheep Company, shall make available for examination by said Receiver, at reasonable times and places, all of its books, records and documents as prayed for in said motion, and said Receiver shall be permitted to take off and copy from the same, or such parts thereof, as he shall deem necessary or advisable for the performance of his duties as said Receiver.

Dated: December 4, 1957.

/s/ FRED M. TAYLOR,

United States District Judge.

Form approved by Jess Hawley.

[Endorsed]: Filed December 4, 1957.

[Title of District Court and Cause.]

STIPULATION AND ORDER FOR SALE OF PROPERTY

It Is Hereby Stipulated By and between all of the parties in the above-entitled action that the above-entitled court may authorize and direct the receiver in the above-entitled action to sell the following personal property, to wit:

Approximately 372.97 tons of alfalfa	
hay at \$14 per ton	\$5,221.58
Approximately 1600 bushel of oats	
at 2c per pound	720.00
1—1955 Chevrolet two-ton truck	2,000.00
1—1951 Chevrolet Pickup truck,	
Motor No. JBA753268,	
Serial No. 6 PJPF 10512	500.00
Approximately 900 bales of straw	
at \$1 per bale	900.00
	<hr/>
Total	\$9,341.58

Said sale may be at private sale and the Receiver represents that this is the best price obtainable for said personal property. The whole of said purchase price shall be turned over and delivered to the First Security Bank, Boise, Idaho, to apply on the note and mortgage held by said bank on said personal property.

LANGROISE & SULLIVAN,

By /s/ W. E. SULLIVAN,
Attorneys for Plaintiffs.

HAWLEY & HAWLEY,

By /s/ JOHN T. HAWLEY.

ORDER

Pursuant to the above and foregoing Stipulation, it is so ordered.

Dated: December 16th, 1957.

/s/ FRED M. TAYLOR,
Judge U. S. District Court.

[Endorsed]: Filed December 16, 1957.

[Title of District Court and Cause.]

ORDER

Objections of defendants to interrogatories of plaintiffs were heard in open court on November 29, 1957, and at the conclusion thereof said matters were taken under advisement by the Court. The Court, having considered said interrogatories and the objections thereto, it is hereby ordered:

That the objection of defendant, Bank of Idaho, be and it hereby is sustained;

That the objections of defendant, Wickahoney Sheep Company, to interrogatories numbered 3, 4, 5, 6, 7, 8, 15, 16, 17, 18, 19, and 22 be and they hereby are sustained; that the objection to interrogatory numbered 14 be and it hereby is overruled.

Dated this 19th day of December 1957.

/s/ FRED M. TAYLOR,
United States District Judge.

[Endorsed]: Filed December 19, 1957.

[Title of District Court and Cause.]

ANSWER TO PLAINTIFFS'
INTERROGATORY No. 14

Comes Now the defendant Wickahoney Sheep Company and, in response to the interrogatories directed to defendant pursuant to Rule 33, Federal Rules of Civil Procedure, makes the following answer:

Answer to Interrogatory No. 14: Yes. \$2,000.00.

HAWLEY & HAWLEY,

By /s/ JESS B. HAWLEY, JR.,
Attorneys for Defendant Wickahoney Sheep Company.

Duly verified.

Service of copy acknowledged.

[Endorsed]: Filed February 1, 1958.

[Title of District Court and Cause.]

NOTICE OF TAKING
DEPOSITION

To: Hawley & Hawley, of Boise, Idaho, Attorneys for Defendants, and to Elam & Burke, of Boise, Idaho, Attorneys for Defendant, Bank of Idaho:

Please Take Notice, that the above-named Plaintiffs will take the testimony on oral examination of Ciriaco Lezamiz, President of Defendant, Wickahoney Sheep Co., etc., et al.

honey Sheep Company, a corporation, before G. C. Vaughan, a Notary Public, on Monday, the 3rd day of March, 1958, at 10:00 o'clock in the forenoon of that day, and thereafter from day to day as the taking of the deposition may be adjourned, at Room 210 Federal Building, Boise, Idaho, at which time and place you are notified to appear and take such part in the examination as you may be advised, and as shall be fit and proper.

LANGROISE & SULLIVAN,

By /s/ W. E. SULLIVAN,

Attorneys for Plaintiffs.

Service of copy acknowledged.

[Endorsed]: Filed February 21, 1958.

[Title of District Court and Cause.]

APPEARANCE

Comes Now John T. Hawley of Hawley & Hawley, and enters the appearance of L. E. Haight, of Boise, Idaho, as additional counsel for the defendants herein.

Dated this 1st day of March, 1958.

L. E. HAIGHT,

HAWLEY & HAWLEY,

By /s/ JOHN T. HAWLEY,

Attorneys for Defendant.

Affidavit of mail attached.

[Endorsed]: Filed March 1, 1958.

[Title of District Court and Cause.]

MOTION FOR PRODUCTION, INSPECTION
AND COPYING OF DOCUMENTS

Plaintiffs, C. A. Sewell, Orene H. Sewell and Orville R. Wilson, move this Honorable Court for an Order requiring the defendant, Bank of Idaho, to produce and to permit plaintiffs to inspect and to copy or photograph each of the following documents:

All promissory notes given by defendant, Wickahoney Sheep Company, to defendant, Bank of Idaho.

All chattel mortgages given by defendant, Wickahoney Sheep Company to defendant, Bank of Idaho.

All agreements, guarantees, and assurances given to defendant, Bank of Idaho, by defendant, Wickahoney Sheep Company, or any other person, association or corporation in connection with said above-described promissory notes.

All financial statements, balance sheets, profit and loss statements, and other documents evidencing financial condition given by defendant, Bank of Idaho, by defendant, Wickahoney Sheep Company.

The defendant, Bank of Idaho, has the possession, custody or control of each of the foregoing documents. Each of them constitutes or contains evidence relevant and material to a matter involved

in this action as is more fully shown in Exhibit A attached hereto.

LANGROISE & SULLIVAN,

By /s/ W. E. SULLIVAN,

Attorneys for Plaintiffs.

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION FOR
PRODUCTION, INSPECTION AND COPY-
ING OF DOCUMENTS

State of Idaho,
County of Ada—ss.

W. E. Sullivan, being first duly sworn, deposes and says:

That he is one of the attorneys for the plaintiffs in the above-entitled cause, that all of the documents listed and described in the above and foregoing Motion for the Production, Inspection and Copying of Documents are in the possession, custody or control of defendant, Bank of Idaho; that each and every of said documents are competent, material and relevant to the issues in the above-entitled action.

/s/ W. E. SULLIVAN.

Subscribed and sworn to before me on this 31st day of March, 1958.

[Seal] /s/ GLORIAN LEDVINA,
Notary Public for Idaho.

Service of copy acknowledged.

[Endorsed]: Filed March 31, 1958.

[Title of District Court and Cause.]

NOTICE OF HEARING ON MOTION FOR
PRODUCTION, INSPECTION AND COPY-
ING OF DOCUMENTS

To Hawley & Hawley, of Boise, Idaho, Attorneys
for Defendant, Wickahoney Sheep Company,
and to Elam & Burke, of Boise, Idaho, At-
torneys for Defendant, Bank of Idaho:

Please Take Notice that the undersigned will
bring on for hearing the Motion of Plaintiffs for
the Production, Inspection and Copying of Docu-
ments before this court in the courtroom of the
United States District Court for the District of
Idaho, Southern Division, in the Federal Building
in Boise, Idaho, on Wednesday, the 2nd day of
April, 1958, at 1:30 o'clock in the afternoon of that
day, or as soon thereafter as counsel can be heard.

LANGROISE & SULLIVAN,

By /s/ W. E. SULLIVAN,
Attorneys for Plaintiffs.

Service of copy acknowledged.

[Endorsed]: Filed March 31, 1958.

[Title of District Court and Cause.]

NOTICE OF TAKING
DEPOSITION

To Hawley & Hawley, of Boise, Idaho, Attorneys
for Defendant, Wickahoney Sheep Company,
and to Elam & Burke, of Boise, Idaho, At-
torneys for Defendant, Bank of Idaho:

Please Take Notice that the plaintiffs, C. A. Sewell, Orene H. Sewell, and Orville R. Wilson, will take the testimony on oral examination of J. R. Simplot before Edward F. Seymour, a notary public, or another notary public qualified by law to take depositions, on Saturday, the 5th day of April, 1958, at 10:00 o'clock in the forenoon of that day, and thereafter from day to day as the taking of the deposition may be adjourned, at the courtroom of the United States District Court in the Federal Building, at Boise, Ada County, State of Idaho, at which time and place you are notified to appear and take such part in the examination as you may be advised, and as shall be fit and proper.

LANGROISE & SULLIVAN,

By /s/ W. E. SULLIVAN,

Attorneys for Plaintiffs.

Service of copy acknowledged.

[Endorsed]: Filed March 31, 1958.

[Title of District Court and Cause.]

MINUTE ENTRY—APRIL 3, 1958

Judge Taylor.

This cause came on for hearing on plaintiffs' motion for production of documents, Willis Sullivan appearing for the plaintiff, Jess B. Hawley appearing for the defendant Wickahoney Sheep Company and Laurel Elam appearing for the Bank of Idaho.

After hearing counsel they conceded items 1, 2 and 4. The Court withheld ruling on item 3 at this time and defendant was ordered to be prepared to produce item 3 at the time of trial.

It was ordered that pretrial hearing be set for 10:00 o'clock a.m., Wednesday, April 9, 1958.

[Title of District Court and Cause.]

MINUTE ENTRY—APRIL 9, 1958

Judge Taylor.

This cause came on regularly for pretrial hearing, W. H. Langroise and Willis Sullivan appearing for the plaintiff, Jess B. Hawley and Lloyd E. Haight appearing for the defendant, and Laurel Elam appearing for the Bank of Idaho.

Upon motion of counsel for the plaintiff, the Supplemental Complaint was ordered amended by

interlineation by adding the word "wool" in line 11 in paragraph I on page 1. Thereupon, Jess Hawley, one of counsel for the defendant, moved the Court to amend the Answer to Supplemental Complaint by adding "and by established certain and general custom," at the end of paragraph I on page 1. It was so ordered.

At the conclusion of the hearing the Court ordered counsel to file a stipulation covering the matters agreed to or, if they desired to have a transcript made of the hearing, they could file a copy thereof in lieu of the stipulation.

[Title of District Court and Cause.]

MINUTE ENTRY—APRIL 10, 1958

Judge Taylor.

This cause came on for trial before the Court, sitting without a jury, Wm. Langroise, Esq., and Willis Sullivan, Esq., appeared as counsel for the plaintiff, and Jess Hawley, Esq., Lloyd Haight, Esq., and Laurel Elam, Esq., appeared as counsel for the defendant.

C. A. Sewell, W. E. Sullivan, Cirao Lezamiz and Blain Austin were sworn and testified as witnesses and other evidence was introduced on the part of the plaintiff, and here the plaintiff rests.

Plaintiff having rested his case in chief comes now Jess B. Hawley, one of counsel for the de-

fendants, and moves the Court for an Order dismissing this cause of action. After hearing counsel the motion was by the Court denied.

Ciraio Lezamiz was sworn and testified as a witness on the part of the defendant.

Thereupon, court adjourned to 10:00 o'clock a.m., Friday, April 11, 1958.

[Title of District Court and Cause.]

MINUTE ENTRY—APRIL 11, 1958

Judge Taylor.

This cause came on for further trial before the Court; counsel for the respective parties being present.

Jesus Baldarama, Loyd E. Haught and Harley McDowell were sworn and testified as witnesses and other evidence was introduced on the part of the defendant, and here the defendant rests.

Defendant having rested comes now the plaintiff and moves the Court for an order dismissing this cause of action. After hearing counsel the Court reserved his ruling.

And here both sides close.

Comes now the defendant and renews his motion made at the close of plaintiff's case in chief; the Court made the same ruling.

Upon agreement of counsel, it was ordered that argument be submitted on brief, the opening brief to be filed within 20 days, the answering brief to be filed within 20 days thereafter, and reply brief filed within 10 days. Thereupon, the matter was taken under advisement.

[Title of District Court and Cause.]

STIPULATION FOR SALE
OF PROPERTY

It Is Hereby Stipulated and Agreed by and between all of the parties in the above-entitled action that the above-entitled court may authorize and direct the Receiver in the above-entitled action to sell all property of Wickahoney Sheep Company now in his possession and remaining unsold.

And Further that the sale of said property shall be for the best price obtainable by the Receiver, and may be either at public or private sale, and in such lots or quantities as the Receiver in his discretion may determine.

LANGROISE & SULLIVAN,

By /s/ W. E. SULLIVAN,
Attorneys for Plaintiffs.

HAWLEY & HAWLEY,

By /s/ JESS B. HAWLEY, JR.,
Attorneys for Defendants.

ELAM & BURKE,

By /s/ LAUREL E. ELAM,
Attorneys for Defendant
Bank of Idaho.

ORDER

Pursuant to the above and foregoing stipulation,

It Is Hereby Ordered That the Receiver in the above-entitled action is hereby authorized and directed to sell all of the property of Wickahoney Sheep Company now in his possession and remaining unsold.

And It Is Further Ordered that the sale of said property shall be for the best price obtainable by the Receiver, and may be either at public or private sale, and in such lots and quantities as the Receiver may in his discretion determine.

Dated: April 11th, 1958.

/s/ FRED M. TAYLOR,
Judge, U. S. District Court.

[Endorsed]: Filed April 11, 1958.

[Title of District Court and Cause.]

MOTION AND ORDER

Come Now the defendants above named, and respectfully move this honorable Court for an order extending until June 9, 1958, the time within which

defendants are required to serve and file their brief herein.

ELAM & BURKE,
HAWLEY & HAWLEY,

By /s/ JOHN T. HAWLEY,
Attorneys for Defendants.

ORDER

Pursuant to the within and foregoing stipulation, and good cause appearing therefor,

It Is Hereby Ordered that defendants may have to and including June 9, 1958, within which to serve and file their brief herein.

Dated this 28th day of May, 1958.

/s/ FRED M. TAYLOR,
District Judge.

[Endorsed]: Filed May 28, 1958.

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated and Agreed by and between the parties hereto that the plaintiffs may have up to and including July 2, 1958, within which to file their Reply Brief in the above-entitled action.

Dated: June 18, 1958.

LANGROISE & SULLIVAN,

By /s/ W. E. SULLIVAN,
Attorneys for Plaintiffs.

ELAM & BURKE,
LLOYD E. HAIGHT,
HAWLEY & HAWLEY,

By /s/ JESS B. HAWLEY, JR.,
Attorneys for Defendants.

ORDER

Pursuant to the above and foregoing Stipulation,

It Is Hereby Ordered that plaintiffs may have up to and including July 2, 1958, within which to file their Reply Brief in the above-entitled action.

Dated: June 19th, 1958.

/s/ FRED M. TAYLOR,
United States District Judge.

[Endorsed]: Filed June 19, 1958.

U. S. Treasury Department

Internal Revenue Service

Statement of Internal Revenue Taxes Due
As an Expense of Administration of an Estate

In the matter of: Wickahoney Sheep Co.,
Bruneau, Idaho.

Date of this statement: Sept. 19, 1958.

Name and address of fiduciary: Blaine Austin,
Receiver, c/o Langroise & Sullivan, McCarty Bldg.

Request is hereby made for payment of taxes
due, under internal revenue laws of the United
States, as stated below:

Kind of Tax and Period	Amount Assessed	Balance Due
1957 Withholding	695.18	695.18
Interest assessed	1.60	1.60
Estimated 1958 Withholding tax liability incurred to date	521.37	521.37
Accrued interest as of date of this state- ment		24.91
Amount due as of date of this statement.....		<hr/> \$1,243.06

Dollar amount per day at which interest will accrue (at 6%
per annum) after the date of this statement: \$0.11.

The balance due on the assessments, together with
accrued interest, is claimed as an expense of ad-
ministration of the estate referred to above. Please
make your remittance payable to "Internal Rev-
enue Service" and forward to the Office of the
District Director at the address below.

Address: P.O. Box 2618, Boise Idaho.

/s/ CLYDE A. CROOKS,
Chief, Special Procedures Section, Office of Dis-
trict Director of Internal Revenue.

[Endorsed]: Filed September 22, 1958.

[Title of District Court and Cause.]

FIRST AND FINAL ACCOUNT OF RECEIVER

Blaine Austin, Receiver in the above-entitled cause, herewith renders to this Court his first and final account and report as Receiver.

The said Blaine Austin was appointed Receiver of defendant, Wickahoney Sheep Company, in the above-entitled cause, on October 9, 1957. Said Receiver thereupon took possession of all the assets of defendant, Wickahoney Sheep Company, which he could discover, and he filed his inventory with said Court on October 27, 1957.

The following persons have delivered to the Receiver purported claims against defendant, Wickahoney Sheep Company, but said claims have not been paid by the Receiver for the reason that none of said expenses were incurred by him, and all of the same were incurred by defendant, Wickahoney Sheep Company, prior to the appointment of said Receiver, to wit:

Gem State Utilities Corporation	\$ 22.17
Farmers Warehouse, Inc.	17.50
O. K. Rubber Welders	54.00
Utah Oil Refining Company	5.88
Idaho Land & Map Service	237.77
Ciriaco Lezamiz	1,173.00
Lucky Lezamiz	391.00
Melton Arrizabalaga	818.50

Ramon Arrate	808.50
Victor Urquidi	718.96
Julian Mendilibar	818.50
Clarence Sparleder	425.22
Jose Louis Lezamiz	765.82
U. S. Dept. of Internal Revenue	695.18

(Withholding taxes)

That the Receiver has sold all of said assets of said Wickahoney Sheep Company to the following persons, for the following amounts, and is chargeable as follows:

Date	Purchaser	Property	Amount
11/ 3/57	E. C. Warren	441 Ewes	\$ 5,733.00
11/ 3/57	Golden Moffett	110 Lambs	1,390.50
11/ 9/57	Harry Heath & Son	285 Ewes	2,663.67
11/26/57	Ciriaco Lezamiz	64 Ewes	640.00
11/26/57	Ciriaco Lezamiz	18 Bucks	54.00
4/11/58	Ciriaco Lezamiz	1 Cow	
		1 Yearling	200.00
4/12/58	Bruneau Sheep Co.	Misc. equipment	9,000.00
12/24/57	Barlow & Loveland	Misc. property	9,341.58
11/26/57	Barlow & Loveland	2334 Ewes	
		16 Bucks	
		41 Wethers	49,842.00
7/15/58	Barlow & Loveland	Water tank, pump and troughs	500.00
4/15/58	First Security Bank	Refund on Harris contract	4.24
			<hr/> \$79,368.99

Said Receiver is entitled to claims for disbursements as follows:

Ck. #	Date	Payable	For	Amount
1	12/ 6/57	J. W. Perry Agency	Bond	\$ 50.00
2	12/ 9/57	Ramon Arrate	Labor	337.25
3	12/ 9/57	Milton Arrizbaloza	Labor	337.25
4	12/ 9/57	Julian Mendalabir	Labor	337.25
5	12/ 9/57	Victor Urguidi	Labor	337.25
6	12/ 9/57	Jose Lezameiz	Labor	337.25
7	12/ 9/57	Clarence Eparleder	Labor	337.25
8	12/ 9/57	Lube Lezameiz	Labor	157.75
9	12/ 9/57	Ceriacio Lezameiz	Labor	450.00
10	12/13/57	Montgomery-Blunk Co.	Supplies	344.22
11	12/13/57	Gem State Truck Lines	Hauling	494.21
12	12/13/57	Blaine Austin & Co.	Labor and Hay	112.34
13	4/12/58	First Security Bank	Mortgage on equipment	6,148.67
14	4/12/58	First Security Bank	Harris Conditional Sale Contract on equipment	1,308.56
15	4/16/58	Blaine Austin	On account	1,000.00
16	4/18/58	Grassmere Station	Gas	10.50
17	7/28/58	Wells, Baxter & Miller	Acct. services	60.00
18	7/29/58	Farmers Ware. Inc.	Supplies	28.00
19	7/29/58	Patterson Livestock Supply Co.	Medicine	5.85
20	7/29/58	Gem State Utilities Corp. (Tel.)	Telephone	30.53
21	7/29/58	Boise Payette Lmbr.	Supplies	24.82
22	7/29/58	Aero Chevrolet Co.	Repairs	11.24
23	7/29/58	Bill's Blacksmith Shop	Repairs	4.35
24	7/29/58	Bruneau Imple. Gar.	Repairs	27.00
25	7/29/58	Swedes Blacksmith	Repairs	11.00
26	7/29/58	Larry Barnes Chev.	Repairs	128.14
27	7/29/58	Goodman Oil Co.	Stove Oil	96.16
28	7/29/58	Utah Oil Refining Co.	Gas	292.63
29	10/ 3/58	Internal Revenue Ser.	Withholding tax	121.10
1	8/18/58	Harry Golden	Labor	35.00
	12/24/57	First Security Bank	Mortgage payment	9,341.58

 \$22,317.15

Recapitulation :

Receipts	\$79,368.99
Disbursements	22,317.15
	<hr/>
Balance on hand	\$57,051.84

That your Receiver has necessarily incurred the following expenses in the administration of said receivership :

Airplane trans.	\$ 137.70
Car expense	828.90
Room	233.00
Meals	269.35
Telephone	75.00
Miscellaneous	19.25
	<hr/>
	\$1,563.20

That your Receiver requests that he be allowed the payment of said expenses, on which he has already received a credit of \$1,000.00. Your Receiver also requests that he be allowed as reasonable compensation for his services as said Receiver the sum of \$4,000.00.

Wherefore, your Receiver prays that his account by approved, allowed and settled; that he be instructed to pay to himself the sum of \$563.20 as the balance of his expenses, and that he be allowed the sum of \$4,000.00 as reasonable compensation for his services; that he be instructed to pay over and deliver to the Clerk of the above-entitled Court the balance of funds then remaining, being the sum

of \$52,488.64, and that thereupon he be discharged as such Receiver.

/s/ BLAINE AUSTIN,
Receiver.

Duly verified.

Service of copy acknowledged.

[Endorsed]: Filed October 3, 1958.

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated and Agreed by and between all of the parties in the above-entitled action, through their respective attorneys, as follows:

That the First and Final Account of Blaine Austin, Receiver of defendant Wickahoney Sheep Company, appointed in the above-entitled cause, which was rendered and filed in the above-entitled Court on October 3, 1958, is true and correct, and should be settled, allowed and approved; provided, however, that there is no agreement that the purported claims of creditors of Wickahoney Sheep Company which were delivered to said Receiver, but not paid by him, are correct.

That the balance of the funds of said receiver-ship now in the hands of the Receiver is the sum of \$57,051.84; that the personal expenses of said Receiver amounting to the sum of \$1,563.20 are

correct, and should be allowed and paid to him; that he has already received a payment on account of said expenses of \$1,000.00, and the balance of said expenses unpaid is the sum of \$563.20; that the allowance of reasonable compensation to the Receiver for his services as such Receiver shall be left to the discretion of the Court.

After the payment to the Receiver of the balance of his expenses and his compensation for services as allowed by the Court, that the Receiver shall pay over and deliver to the Clerk of the above-entitled Court the balance of funds then remaining, and that thereupon he be discharged as such Receiver.

That there is due and owing from the United States Agricultural Stabilization & Conservation Agency, of Mountain Home, Idaho, as a lamb subsidy for the year 1957 the sum of \$1,166.40; that this sum should be paid directly to the Clerk of the above-entitled Court, and added to and become a part of the receivership funds so paid to said Clerk.

Dated: October 7, 1958.

LANGROISE & SULLIVAN,

By /s/ W. E. SULLIVAN,
Attorneys for Plaintiffs.

HAWLEY & HAWLEY,

By /s/ JOHN T. HAWLEY,
Attorneys for Defendants.

ELAM & BURKE,

By /s/ CLAUDE BURKE,
Attorneys for Defendant,
Bank of Idaho.

[Endorsed]: Filed October 9, 1958.

[Title of District Court and Cause.]

ORDER APPROVING FIRST AND FINAL
ACCOUNT OF RECEIVER AND DIS-
CHARGING RECEIVER

Pursuant to the Stipulation of all the parties
hereto filed in the above-entitled action,

It Is Hereby Ordered that the First and Final
Account of the Receiver of defendant Wickahoney
Sheep Company, appointed in the above-entitled
action, filed in this Court on October 3, 1958, is
hereby settled, allowed and approved; that the bal-
ance of the funds of said receivership now in the
hands of the Receiver is the sum of \$57,051.84; that
the personal expenses of the Receiver amounting
to the sum of \$1,563.20 are hereby allowed and ap-
proved; that said Receiver has received on account
of said expenses the sum of \$1,000.00, and he is
hereby authorized to pay to himself out of the
funds now in his hands the balance of said ex-
penses, being the sum of \$563.20; that there is
hereby allowed to said Receiver as reasonable com-
pensation for his services as such Receiver the sum

of \$3,000.00, which he is authorized to pay to himself out of the funds in his hands; that the balance of the funds of said receivership then remaining in his hands, being the sum of \$53,488.64, shall be paid over and delivered to the Clerk of this Court, and subject to further order of this Court, and thereupon said Receiver shall be and is hereby discharged as such Receiver.

And, It Is Further Ordered that the sum of \$1,166.40 due and owing from the United States Agricultural Stabilization & Conservation Agency, of Mountain Home, Idaho, as lamb subsidy for the year 1957 for defendant Wickahoney Sheep Company shall be paid directly to the Clerk of the above-entitled Court, and added to and become a part of the receivership funds so paid to said Clerk.

Dated: October 9th, 1958.

/s/ FRED M. TAYLOR,
United States District Judge.

[Endorsed]: Filed October 9, 1958.

[Title of District Court and Cause.]

MINUTE ENTRY—OCTOBER 31, 1958

Fred M. Taylor, Judge.

This cause came on for further trial before the Court, sitting without a jury, Willis Sullivan appearing for the plaintiffs; Jess B. Hawley appear-

ing for the defendant, Wickahoney Sheep Co., and Laurel Elam for the Bank of Idaho.

At this time the Court announced his decision as follows: Judgment for the plaintiff and against the defendant, Wickahoney Sheep Co., in the amount of \$149,452.68; Judgment for the plaintiff and against the defendant, Bank of Idaho, for \$86,082.50, any monies received from the Bank to be applied on the judgment against Wickahoney Sheep Co.

It was ordered that the money now on deposit in the registry of this Court, in the amount of \$54,655.04, be applied on said judgment against the Wickahoney Sheep Co.

The Court found for the plaintiffs and against the defendants on defendants' counterclaim.

It was further ordered that counsel for plaintiffs prepare Findings, Conclusions and Judgment, in conformity with the Court's oral opinion, and present same to the Court for approval.

[Title of District Court and Cause.]

OBJECTIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW

Come Now the defendants and object to the proposed findings of fact submitted by the plaintiffs upon the following grounds and for the following reasons:

I.

Object to the recital preceding the findings of fact, as shown on page 1 of said proposed findings, for the reason that Hawley & Hawley appear of record as attorneys for defendant Wickahoney Sheep Company, Elam & Burke appear of record as attorneys for defendant Bank of Idaho, and Lloyd E. Haight does not appear of record as attorney for either of the defendant parties.

II.

Object to Finding No. III in that the evidence fails to establish that all of said personal property was on or about October 15, 1955, examined and accepted by defendant Wickahoney Sheep Company.

III.

Object to that portion of Finding No. VI which states the plaintiffs "duly, regularly and properly gave notice in writing of the above-mentioned defaults" in that the evidence wholly fails to establish such finding. The evidence discloses without contradiction that an escrow agreement was signed by all parties under which the contracts and documents were escrowed with the defendant Bank of Idaho, which specifically provided that all notices of defaults and declarations of forfeiture be delivered to said bank and by it sent by registered mail to defendant Wickahoney Sheep Company. Said escrow agreement further provided that its provisions should govern in the event of conflict with the agreement of purchase and sale between the parties. Defendants therefore request an affir-

mative finding that the plaintiffs did not duly, regularly and properly give notice of default or declare a forfeiture in accordance with the terms of the agreement between the parties.

IV.

Object to that portion of Finding No. VII which finds that the defendant Wickahoney Sheep Company wrongfully and unlawfully failed, refused and neglected to turn over and deliver possession of said personal property, and wrongfully and unlawfully detained and withheld said property from plaintiffs' possession, in that the evidence wholly fails to establish that a legally effective and proper notice of default and declaration of forfeiture were ever given to defendants.

V.

Object to that portion of Finding No. VIII which states that upon forfeiture the plaintiffs "were entitled to the immediate possession of all said personal property * * * and of lambs and increase of the sheep" in that the evidence wholly fails to sustain this finding.

VI.

Object to that portion of Finding No. 10 to the effect that defendant Bank of Idaho wrongfully and unlawfully failed, neglected and refused to turn over and deliver to plaintiffs copies of said purchase agreement and bill of sale in that the evidence wholly fails to support this finding, and the uncontradicted evidence affirmatively establishes that no legal forfeiture, in connection with the

terms of the escrow agreement entered into between the parties and which governed and controlled the action and activities of the Bank of Idaho, was ever given.

VII.

Object to that portion of Finding No. 11, which states the defendant Wickahoney Sheep Company wrongfully and unlawfully sold sheep and lambs belonging to the plaintiffs, in that the uncontradicted evidence establishes that the purchase and sale agreement between the parties was not in default and no effective forfeiture had been declared, said defendant Wickahoney Sheep Company therefore having a legal right to sell and dispose of sheep and lambs.

VIII.

Object to that portion of Finding No. 15 on page 6 which states that the defendant Bank of Idaho had actual knowledge of plaintiffs' ownership and title of the personal property sold, including all lambs and increase born of plaintiffs' sheep, in that this finding is not supported by the evidence, the evidence affirmatively showing that defendant Wickahoney Sheep Company had ownership and title to all lambs and increase from the sheep, the subject matter of the contract;

Further object to that portion of said Finding No. 15 which declares that the chattel mortgages of the Bank of Idaho were inferior and subordinate to plaintiffs' ownership of and title to sheep and lambs and increase thereof, since the evidence

affirmatively shows the right to the sale of the same was in the defendant Wickahoney Sheep Company.

IX.

Object to Finding No. 16 on page 7 in that the evidence wholly fails to support and sustain said finding.

X.

Defendants request and demand an express finding permitting and allowing defendants a credit against the purchase price of \$86,082.50, received by defendant Wickahoney Sheep Company and transmitted to defendant Bank of Idaho, for the necessary and proper expenses incurred by defendant Wickahoney Sheep Company in caring for and operating the sheep being the subject matter of the contract, as disclosed by plaintiffs' Exhibit 2 and defendants' Exhibit 27 and the testimony relative thereto.

XI.

Defendants further object to the conclusions of law, the same being dependent upon erroneous findings as aforesaid.

HAWLEY & HAWLEY,

Attorneys for Defendant Wickahoney Sheep Company;

ELAM & BURKE,

Attorneys for Defendant
Bank of Idaho;

By /s/ JESS B. HAWLEY, JR.

Affidavit of mail attached.

[Endorsed]: Filed December 15, 1958.

[Title of District Court and Cause.]

MINUTE ENTRY—DECEMBER 18, 1958

Judge Taylor.

This matter came on for hearing on defendants objections to findings of fact and conclusions of law; Jess B. Hawley, Jr., and Laurel E. Elam appeared as counsel for defendants, and Willis Sullivan appeared for plaintiffs.

After hearing counsel, it was ordered that objection No. 1 be sustained and objections Nos. 2 to 11, inclusive, be overruled.

The findings of fact and conclusions of law, and judgment, were signed by the Court and ordered filed.

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The above-entitled action came on for trial before the court sitting without a jury, on April 10, 1958, in the courtroom of the above-entitled court at Boise, Idaho, the plaintiffs appearing by their attorneys, Langroise & Sullivan, of Boise, Idaho, and the defendants appearing by their attorneys, Hawley & Hawley, of Boise, Idaho, and Elam & Burke, of Boise, Idaho, attorneys for defendant Bank of Idaho, and testimony, both oral and docu-

mentary, having been offered and briefs filed by both parties, and the court being fully advised in the premises, now makes and finds its

Findings of Fact

I.

That the plaintiffs, C. A. Sewell and Orene H. Sewell, are now, and at all times hereinafter mentioned have been, husband and wife. Each and all of the plaintiffs are citizens of the State of Nevada. Defendant, Wickahoney Sheep Company, is a corporation, incorporated under the laws of the state of Idaho. Defendant, Bank of Idaho (formerly Continental State Bank), is a corporation, incorporated under the laws of the State of Idaho. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.

II.

That on or about the 15th day of December, 1955, plaintiffs, C. A. Sewell and Orene H. Sewell, as sellers, entered into a written Purchase Agreement dated December 15, 1955, with defendant Wickahoney Sheep Company, as purchaser, whereby said sellers promised and agreed to sell to purchaser and purchaser promised and agreed to purchase from sellers all that certain personal property listed and described in Exhibit B attached to said Purchase Agreement for the total purchase price of \$121,700.00, on the terms and conditions set forth in said Purchase Agreement. That a copy of said

Purchase Agreement is attached to plaintiffs' complaint on file in this action, marked Exhibit A, and by reference made a part hereof as though set forth at length herein.

III.

That plaintiffs, C. A. Sewell and Orene H. Sewell, turned over and delivered to defendant Wickahoney Sheep Company all of said personal property being sold under said Purchase Agreement on or about October 15, 1955, and all of said personal property was at that time examined and accepted by defendant Wickahoney Sheep Company. That title to and ownership of all said personal property remained in plaintiffs until defendant Wickahoney Sheep Company had fully performed said Purchase Agreement and paid to plaintiffs the full purchase price therefor.

IV.

That said plaintiffs, C. A. Sewell and Orene H. Sewell, have duly and regularly assigned said Purchase Agreement to plaintiff, Orville R. Wilson.

V.

That defendant Wickahoney Sheep Company failed and refused to perform Purchase Agreement and was in default in the performance thereof in the following respects:

a. Defendant Wickahoney Sheep Company wholly failed and refused to make said payment of \$15,000.00 due and payable under the terms of said

Purchase Agreement on October 15, 1956, or any part thereof.

b. Defendant Wickahoney Sheep Company depleted the 4,005 ewes and 82 bucks, which were a part of plaintiffs' personal property being sold to the Wickahoney Sheep Company under said Purchase Agreement, to the total number of 3,187 ewes and 44 bucks.

VI.

That plaintiffs duly, regularly and properly gave notice in writing of the above-mentioned defaults as provided in said Purchase Agreement, which said notice of default was received by defendant Wickahoney Sheep Company on January 17, 1957, and was received by defendant Bank of Idaho on January 16, 1957. That during the period of ninety days after defendant Wickahoney Sheep Company received said written notice of default, as provided in said Purchase Agreement, defendant Wickahoney Sheep Company wholly failed and refused to remedy said defaults, or any of them, and defendant Wickahoney Sheep Company has never paid to plaintiffs any part of said purchase price except the first payment of \$15,000.00, paid upon the execution of said Purchase Agreement.

VII.

That after the expiration of said ninety-day period following the receipt of said notice of default by defendant Wickahoney Sheep Company, the plaintiffs declared a forfeiture of said Purchase

Agreement and made demand upon said defendant Wickahoney Sheep Company, for delivery to them of all of said personal property being sold to Wickahoney Sheep Company under said Purchase Agreement including all lambs and increase born of said sheep being sold under said Purchase Agreement then in the possession of said defendant Wickahoney Sheep Company, but defendant Wickahoney Sheep Company wrongfully and unlawfully failed, refused and neglected to turn over and deliver possession of said personal property or any part thereof, to plaintiffs, and said defendant Wickahoney Sheep Company, without plaintiffs' consent, wrongfully and unlawfully detained and withheld all of said plaintiffs' personal property from possession of plaintiffs.

VIII.

That none of said personal property, nor any part thereof, was taken for a tax assessment or a fine, pursuant to statute, or seized under an execution or attachment against the property of plaintiffs, or any of them, and plaintiffs, upon the forfeiture of said Purchase Agreement, were entitled to the immediate possession of all of the said personal property listed in said Purchase Agreement and Exhibit B attached thereto, and of lambs and increase of the sheep being sold under said Purchase Agreement and in possession of defendant Wickahoney Sheep Company at the time of forfeiture of Purchase Agreement.

XI.

That prior to the commencement of this action the plaintiffs had duly performed all of the conditions precedent of said Purchase Agreement on their part to be performed.

X.

That under the terms and provisions of said Purchase Agreement an executed copy thereof and Bills of Sale to said personal property were deposited in escrow with defendant Bank of Idaho at Boise, Idaho, as escrow holder. That after plaintiffs declared a forfeiture of said Purchase Agreement they made demand upon defendant Bank of Idaho to turn over and deliver to plaintiffs said executed copies of said Purchase Agreement and Bills of Sale; that defendant Bank of Idaho wrongfully and unlawfully failed, neglected and refused to turn over and deliver to plaintiff said executed copies of said Purchase Agreement and Bills of Sale. That after the commencement of this action defendant Bank of Idaho deposited with the Clerk of the Court said executed copies of said Purchase Agreement and Bills of Sale.

XI.

That after the forfeiture of said Purchase Agreement and after the commencement of this action and the service of summons and complaint herein on defendants Wickahoney Sheep Company and Bank of Idaho, and between July 2, 1957, and August 5, 1957, inclusive, defendant Wickahoney

Sheep Company wrongfully and unlawfully sold sheep and lambs belonging to plaintiffs for the total purchase price of \$86,082.50, without the knowledge or consent of plaintiffs. That the fair and reasonable market value of said lambs and sheep belonging to plaintiffs and so wrongfully and unlawfully sold by defendant Wickahoney, at the time of the forfeiture of said Purchase Agreement was the sum of \$86,082.50.

XII.

That on or about October 9, 1957, defendant Wickahoney Sheep Company turned over and delivered to the receiver appointed in this action all of the property of plaintiffs being sold to defendant Wickahoney Sheep Company under said Purchase Agreement, then remaining in the possession of said Wickahoney Sheep Company. Thereafter all of said personal property of plaintiffs received by said receiver was sold by said receiver for the sum of \$62,370.18; that the fair and reasonable market value of plaintiffs' property turned over and delivered to the receiver by defendant Wickahoney Sheep Company was, at the time of the forfeiture of said Purchase Agreement, the sum of \$62,370.18.

XIII.

That defendant Wickahoney Sheep Company failed and refused to turn over to said receiver one 1954 International 1½ ton truck, or to account therefor; that the fair and reasonable market value

of said truck at the time of the forfeiture of said Purchase Agreement was the sum of \$1,000.

XIV.

That the final account of said receiver has been approved by this Court and said receiver has been discharged; that said receiver has turned over and delivered to the clerk of this court all monies remaining in his hands after paying all of the costs and expenses of said receivership, being the sum of \$54,655.04, which sum is now held by the clerk of this court.

XV.

That defendant Bank of Idaho (formerly Continental State Bank) had at all times actual knowledge and notice of said Purchase Agreement and of plaintiffs' ownership of and title to all of said personal property being sold by plaintiffs to defendant Wickahoney Sheep Company under said Purchase Agreement, including all lambs and increase born of plaintiffs' sheep. That without the knowledge and consent of plaintiffs defendant Bank of Idaho received and accepted from defendant Wickahoney Sheep Company chattel mortgages upon the sheep and lambs and increase thereof owned by plaintiffs, which chattel mortgages and the sums of money secured thereby are as follows:

Date of Mortgage	Amount
9/17/56	\$ 50,000
11/ 1/56	50,000
11/27/56	65,000
1/ 5/57	100,000

That each and every one of said chattel mortgages above described is inferior and subordinate to plaintiffs' ownership of and title to said sheep and the lambs and increase thereof, and is subject to all the terms and conditions of said Purchase Agreement. That releases and satisfactions of said chattel mortgages have been deposited with the clerk of this Court.

XVI.

That defendant Bank of Idaho at all times had notice and knowledge that the lambs and sheep sold by defendant Wickahoney Sheep Company between the dates of July 2, 1957, and August 5, 1957, as hereinabove mentioned, were the property of plaintiffs, and that plaintiffs were entitled to the possession thereof. That defendant Wickahoney Sheep Company paid over and delivered to defendant Bank of Idaho out of the proceeds received from the sale of plaintiffs' sheep and the increase and lambs born of said sheep the sum of \$86,082.50, all of which was well known by defendant Bank of Idaho; that the defendant Bank of Idaho thereby wrongfully and unlawfully converted to its own uses monies and funds of plaintiffs, and to which plaintiffs were entitled, in the amount of \$86,082.50.

XVII.

That none of said plaintiffs at any time made any false or fraudulent representations to defendant Wickahoney Sheep Company, or any of its officers, agents or employees concerning said Purchase Agreement or any of the personal property being

sold to defendant Wickahoney Sheep Company under the terms thereof.

Conclusions of Law

From the foregoing facts the Court concludes:

I.

That this court has jurisdiction over this action on the grounds of diversity of citizenship of the parties hereto under the provisions of 28 U.S.C. Section 1332.

II.

That on or about October 15, 1955, Plaintiffs C. A. Sewell and Oren H. Sewell turned over and delivered to Defendant Wickahoney Sheep Company all of said personal property being sold under Purchase Agreement, and all of said personal property was at that time examined and accepted by Defendant Wickahoney Sheep Company.

III.

That title to and ownership of all of the personal property being sold to Defendant Wickahoney Sheep Company under said Purchase Agreement remained in Plaintiffs until Defendant Wickahoney Sheep Company had fully performed said Purchase Agreement and paid to Plaintiffs the full purchase price therefor. That title to and ownership of all lambs and increase born of Plaintiffs' sheep being sold under said Purchase Agreement was in Plaintiffs subject to the terms and conditions of said Purchase Agreement.

IV.

That Defendant Wickahoney Sheep Company failed and refused to perform said Purchase Agreement and was in default of the performance thereof prior to January 16, 1957.

V.

That Plaintiffs duly, regularly and properly gave notice in writing of the defaults of Defendant Wickahoney Sheep Company for failure to perform said Purchase Agreement, which said notice of default was received by Defendant Wickahoney Sheep Company on January 17, 1957, and was received by Defendant Bank of Idaho on January 16, 1957.

VI.

That Defendant Wickahoney Sheep Company wholly failed and refused to remedy said defaults, or any of them, within ninety days after it received written notice of default, and thereupon Plaintiffs declared a forfeiture of said Purchase Agreement and made demand upon Defendant Wickahoney Sheep Company for delivery to them of all of said personal property being sold to Wickahoney Sheep Company under said Purchase Agreement, including all lambs and increase born of said sheep being sold under said Purchase Agreement then in the possession of Defendant Wickahoney Sheep Company, but Defendant Wickahoney Sheep Company wrongfully and unlawfully failed, refused and neglected to turn over and deliver possession of said personal property, and any part thereof

to Plaintiffs, and said Defendant Wickahoney Sheep Company, without Plaintiffs' consent, wrongfully and unlawfully detained and withheld all of said Plaintiffs' personal property from possession of Plaintiffs.

VII.

That upon the forfeiture of said Purchase Agreement Plaintiffs had title to and ownership of and were entitled to immediate possession of all of said personal property being sold to Defendant Wickahoney Sheep Company under said Purchase Agreement, including all lambs and increase born of said Plaintiffs' sheep and then in the possession of said Wickahoney Sheep Company.

VIII.

That prior to the commencement of this action the Plaintiffs had duly performed all of the conditions precedent of said Purchase Agreement on their part to be performed.

IX.

That delivery of said personal property cannot be had, and therefore Plaintiffs are entitled to judgment against Defendant Wickahoney Sheep Company for the value thereof at the time of the forfeiture of said Purchase Agreement. That the fair and reasonable market value of Plaintiffs' personal property at the time of the forfeiture of said Purchase Agreement is the sum of \$149,452.68, and Plaintiffs are entitled to judgment against Defendant Wickahoney Sheep Company in that amount.

X.

That Plaintiffs are entitled to have turned over and delivered to them the executed copy of said Purchase Agreement and the Bills of Sale to said personal property formerly in escrow with the Defendant Bank of Idaho as escrow holder and now in the possession of the clerk of this court.

XI.

That all chattel mortgages held by Defendant Bank of Idaho on Plaintiffs' personal property including the lambs and increase of Plaintiffs' sheep being sold under said Purchase Agreement were inferior and subordinate to Plaintiffs' ownership of and title thereto, and subject to all the terms and conditions of said Purchase Agreement. That Defendant Bank of Idaho was not an innocent, bona fide holder of any said chattel mortgages as against said Plaintiffs.

XII.

That after the forfeiture of said Purchase Agreement Defendant Wickahoney Sheep Company wrongfully and unlawfully, and without consent of Plaintiffs, sold sheep and lambs belonging to Plaintiffs for the total purchase price of \$86,082.50, to which monies and funds Plaintiffs were rightfully and lawfully entitled.

XIII.

That Defendant Wickahoney Sheep Company paid over and delivered to Defendant Bank of Idaho

the said sum of \$86,082.50, being the proceeds from the wrongful and unlawful sale of Plaintiffs' sheep and the increase and lambs born of said sheep, after forfeiture of said Purchase Agreement, all of which was well known by Defendant Bank of Idaho, and Defendant Bank of Idaho received and accepted said funds and monies of the Plaintiffs and thereby wrongfully and unlawfully converted to its own use said monies and funds of Plaintiffs, and Plaintiffs are entitled to judgment against said Defendant Bank of Idaho for the recovery thereof, amounting to the said sum of \$86,082.50. That all monies paid by Defendant Bank of Idaho to Plaintiffs in satisfaction of said judgment shall be applied upon and partially satisfy pro tanto the judgment in favor of Plaintiffs against Defendant Wickahoney Sheep Company.

XIV.

That Plaintiffs are entitled to have turned over and delivered to them all releases and satisfactions of all chattel mortgages on their personal property now in the possession of the clerk of this court.

XV.

That the Plaintiffs are entitled to have turned over and delivered to them by the clerk of this court the sum of \$54,655.04 now in the possession of said clerk, being the balance remaining from the liquidation of Plaintiffs' property by the receiver in this action, said sum to be applied in partial payment and partial satisfaction of the

judgment against Defendant Wickahoney Sheep Company only in this action.

XVI.

Let judgment be entered accordingly.

Dated this 18th day of December, 1958.

/s/ FRED M. TAYLOR,
U. S. District Judge.

Service of copy acknowledged.

Lodged December 8, 1958.

[Endorsed]: Filed December 18, 1958.

In the District Court of the United States for the
District of Idaho, Southern Division

No. 3339

C. A. SEWELL, ORENE H. SEWELL,
and ORVILLE R. WILSON,
Plaintiffs,

vs.

WICKAHONEY SHEEP COMPANY, an
Idaho corporation, and BANK OF IDAHO
(formerly Continental State Bank), an
Idaho corporation,
Defendants.

JUDGMENT

The above entitled action came on for trial before the court sitting without a jury, on April 10, 1958,

in the courtroom of the above entitled court at Boise, Idaho, the Plaintiffs appearing by their attorneys, Langroise & Sullivan, of Boise, Idaho, and the Defendants appearing by their attorneys, Hawley & Hawley, of Boise, Idaho, and Elam & Burke, of Boise, Idaho, attorneys for Defendant Bank of Idaho, and testimony, both oral and documentary, having been offered and briefs filed by both parties, and the Court being fully advised in the premises, and having made, entered and filed its findings of fact and conclusions of law,

It Is Hereby Ordered, adjudged and decreed that the Plaintiffs have judgment against the Defendants as follows:

1. That Plaintiffs have judgment against Defendant Wickahoney Sheep Company in the sum of \$149,452.68.

2. That Plaintiffs have judgment against Defendant Bank of Idaho in the sum of \$86,082.50; that all monies paid by Defendant Bank of Idaho to Plaintiffs on said judgment against it shall be applied upon and be in partial satisfaction, pro tanto, of said judgment against Defendant Wickahoney Sheep Company.

3. That the clerk of this court shall immediately pay over and deliver to Plaintiffs the sum of \$54,655.04, now in his hands, to be applied in partial satisfaction of said judgment against Defendant Wickahoney Sheep Company only.

4. That the clerk of this court shall immediately

turn over and deliver to Plaintiffs the executed copies of the Purchase Agreement and the Bills of Sale now in his possession which were formerly in escrow with Defendant Bank of Idaho.

5. That the clerk of this court shall immediately turn over and deliver to Plaintiffs all releases and satisfactions of chattel mortgages now in his possession, and given by Defendant Bank of Idaho to release and satisfy all chattel mortgages on Plaintiffs' property.

6. That Plaintiffs have judgment against both Defendants, jointly and severally, for their costs and disbursements incurred and expended in this action, to be hereinafter fixed, on notice, and hereinafter inserted by the clerk of this court in the sum of \$39.00.

7. That this judgment, and all sums due and payable to Plaintiffs by Defendants hereunder shall bear interest at the rate of six per cent per annum from the date hereof until paid.

Dated this 18th day of December, 1958.

/s/ FRED M. TAYLOR,
U. S. District Judge.

Service of copy acknowledged.

Lodged December 8, 1958.

[Endorsed]: Filed December 18, 1958.

RECEIPT

Received of Ed M. Bryan, Clerk U. S. District Court, the following:

Purchase Agreement dated December 15, 1955.

Bill of Sale dated October 17, 1955.

Chattel Mortgage (Plaintiff's Exhibit No. 21)
(cancelled).

Chattel Mortgage (Plaintiff's Exhibit No. 3)
(cancelled).

Chattel Mortgage (Plaintiff's Exhibit No. 4)
(cancelled).

Chattel Mortgage (Plaintiff's Exhibit No. 5)
(cancelled).

Check No. 2573, payable to C. A. Sewell, Orene H. Sewell, and Orville R. Wilson, in the amount of \$54,655.04.

/s/ W. H. LANGROISE.

[Endorsed]: Filed December 22, 1958.

[Title of District Court and Cause.]

BILL OF COSTS

Attorneys' Docket Fee.....	\$20.00
Filing Fee	15.00
U. S. Marshall-Service of Summons....	4.00
	<hr/>
Total	39.00

Costs taxed this 29th day of January, 1958, in the amount of \$39.00.

/s/ ED M. BRYAN,
Clerk.

Duly verified.

Service of copy acknowledged.

[Endorsed]: Filed December 22, 1958.

[Title of District Court and Cause.]

NOTICE OF TAXATION OF COSTS

To Hawley & Hawley, Boise, Idaho, attorneys for Defendants, and to Elam & Burke, attorneys for Defendant Bank of Idaho:

Please Take Notice, That the Bill of Costs, a copy of which is hereto attached, will be presented to the clerk of the above court for taxation at his office in the Federal Building, Boise, Idaho, on Monday, December 29, 1958, at 2:00 o'clock in the afternoon of that day.

Dated: December 22, 1958.

LANGROISE & SULLIVAN,

By /s/ W. E. SULLIVAN,
Attorneys for Plaintiffs.

Service of copy acknowledged.

[Endorsed]: Filed December 22, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given That the Bank of Idaho (formerly Continental State Bank), an Idaho corporation, and one of the Defendants above named, does hereby appeal to the United States Court of Appeals for the Ninth Circuit from that final judgment made and entered in this action on the 18th day of December, 1958.

Dated this 12th day of January, 1959.

HAWLEY & HAWLEY,

By /s/ JESS B. HAWLEY, JR.,

ELAM AND BURKE,

By /s/ LAUREL E. ELAM,

Attorneys for Defendant
Bank of Idaho.

Service of copy acknowledged.

[Endorsed]: Filed January 12, 1959.

[Title of District Court and Cause.]

STIPULATION

Come Now the Plaintiffs herein, and Bank of Idaho (formerly Continental State Bank), one of the Defendants, by and through their respective counsel of record, and hereby stipulate that the amount of the supersedeas bond to be filed by said

Defendant with its notice of appeal shall be fixed in the total amount of \$95,000.00, the same to be conditioned for the satisfaction of the judgment made and entered December 18, 1958, against the above-named Defendant, together with costs, interest thereon, and damages for delay.

It Is Further Stipulated that any and all proceedings to enforce said judgment as aforesaid against Defendant Bank of Idaho be stayed pending the determination of Defendant's appeal.

HAWLEY & HAWLEY,

By /s/ JESS B. HAWLEY, JR.,
Attorneys for Defendant
Bank of Idaho.

ELAM AND BURKE,

By /s/ LAUREL E. ELAM,
Attorneys for Defendant
Bank of Idaho.

W. H. LANGROISE,
W. E. SULLIVAN,

By /s/ W. H. LANGROISE,
Attorneys for Plaintiffs.

ORDER

Pursuant to the above and foregoing stipulation, and good cause appearing therefor,

It Is Hereby Ordered that the supersedeas bond to be filed by the Bank of Idaho, one of the De-

fendants above named, with its notice of appeal, be fixed in the amount of \$95,000.00, and that upon the filing of the appropriate notice of appeal and of the bond as aforesaid any proceedings to enforce that certain judgment entered in the above-entitled case against Defendant Bank of Idaho on December 18, 1958, be stayed pending the determination of the Defendant's appeal from such judgment.

Dated this 12th day of January, 1959.

/s/ FRED M. TAYLOR,
District Judge.

[Endorsed]: Filed January 12, 1959.

[Title of District Court and Cause.]

SUPERSEDEAS BOND

Know All Men By These Presents: That we, Bank of Idaho, formerly Continental State Bank, an Idaho corporation, and one of the above-named Defendants, as principal, and United Pacific Insurance Company, a corporation organized and existing under the laws of the State of Washington, and duly authorized to transact a surety business in the State of Idaho, as surety, are firmly held and bound unto C. A. Sewell, Orene H. Sewell, and Orville R. Wilson, the Plaintiffs above named, in the full and just sum of Ninety-five Thousand and no/100 (\$95,000.00) Dollars, to be paid to the

said Plaintiffs above named, their successors, executors, administrators and assigns, to which payment well and truly to be made we bind ourselves, our successors and assigns, jointly and severally, by these presents.

Whereas, on December 18, 1958, in the above-entitled action, a judgment was rendered, made and entered against Bank of Idaho, one of the Defendants above named, in the amount of \$86,082.50, together with costs fixed at \$39.00, and the said Defendant Bank of Idaho, an Idaho corporation, having filed a notice of appeal to reverse the judgment in the aforesaid suit to the United States Court of Appeals for the Ninth Circuit; now the condition of this obligation is such that if the said Bank of Idaho, an Idaho corporation, and one of the Defendants, shall prosecute its appeal to effect and shall satisfy the judgment in full, together with costs, interest and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and shall satisfy in full such modification of the judgment and such costs, interest and damages as the said Court of Appeals may adjudge and award, then this obligation to be **void; otherwise to be and remain in full force and effect.**

The said surety herein hereby irrevocably appoints the clerk of this court as its agent upon whom any papers affecting its liability on this undertaking may be served.

Signed, sealed and delivered this 12th day of January, 1959.

BANK OF IDAHO,
Formerly Continental State Bank, an Idaho corporation, Principal;

By /s/ JAMES BYERS,
Its President.

[Seal] UNITED PACIFIC INSURANCE COMPANY,
Surety;

By /s/ JENS W. SWAN,
Its Attorney in Fact.

Countersigned.

/s/ JENS W. SWAN,
Resident Agent for United Pacific Insurance Company at Boise, Idaho.

Surety and amount approved this 12th day of January, 1959.

/s/ FRED M. TAYLOR,
District Judge.

[Endorsed]: Filed January 12, 1959.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Wickahoney Sheep Company, an Idaho corporation, and one of the Defendants above named, does hereby appeal to the United States Court of Appeals for the Ninth

Circuit from that final judgment made and entered in this action on the 18th day of December, 1958.

Dated this 12th day of January, 1959.

HAWLEY & HAWLEY,
By /s/ JESS B. HAWLEY, JR.,
Attorneys for Defendant
Wickahoney Sheep Co.

Service of copy acknowledged.

[Endorsed]: Filed January 12, 1959.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men By These Presents:

That we, Wickahoney Sheep Company, an Idaho corporation, one of the above-named Defendants, as principal, and United Pacific Insurance Company, a corporation organized and existing under the laws of the State of Washington, and duly authorized to transact a surety business in the State of Idaho, as surety, do hereby jointly and severally acknowledge that we are held and firmly bound unto C. A. Sewell, Orene H. Sewell and Orville R. Wilson, Plaintiffs above named, in the sum of \$300.00, to be paid to the said Plaintiffs, their successors, executors, administrators and assigns.

The condition of this bond is that whereas the Defendant above named, Wickahoney Sheep Com-

pany, has appealed to the Court of Appeals for the Ninth Circuit by notice of appeal filed January 12, 1959, from the final judgment of this court made and entered on December 18, 1958, and if the Defendant Wickahoney Sheep Company shall pay to Plaintiffs all costs adjudged against it if said appeal be dismissed or the said judgment affirmed, or such costs as the said appellate court may award if the judgment be modified, then this bond is to be void, but if the Defendant Wickahoney Sheep Company fails to perform this condition, payment of the amount of this bond shall be due and made forthwith.

Signed, sealed and delivered this 12th day of January, 1959.

WICKAHONEY SHEEP CO.,
Principal;

By/s/ L. E. HAIGHT,
Its Vice President.

[Seal] UNITED PACIFIC INSUR-
ANCE COMPANY,
Surety;

By /s/ JENS W. SWAN,
Its Attorney in Fact.

Countersigned:

/s/ JENS W. SWAN,
Resident Agent for United Pacific Insurance Com-
pany at Boise, Idaho.

[Endorsed]: Filed January 12, 1959.

In the District Court of the United States in and
for the District of Idaho, Southern Division

No. 3239

C. A. SEWELL, ORENE H. SEWELL, and
ORVILLE R. WILSON,

Plaintiffs,

vs.

WICKAHONEY SHEEP COMPANY, an Idaho
Corporation, and BANK OF IDAHO (for-
merly Continental State Bank), an Idaho Cor-
poration,

Defendants.

Honorable Fred M. Taylor, Judge.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Appearances:

For the Plaintiff:

LANGROISE & SULLIVAN,
Boise, Idaho.

For the Defendant Wickahoney Sheep Com-
pany:

HAWLEY & HAWLEY, by
MR. JESS B. HAWLEY, JR.,
Boise, Idaho.

For the Defendant Bank of Idaho:

ELAM & BURKE, by
MR. LAUREL ELAM,
Boise, Idaho.

Boise, Idaho, April 10, 1958, 10:00 o'Clock A.M.

The Clerk: Number 3339, C. A. Sewell, et al., Plaintiff versus Wickahoney Sheep Company and Bank of Idaho, for trial before the Court without a jury.

The Court: Are you ready to proceed in this matter, gentlemen?

Mr. Hawley: Yes, we are, your Honor.

Mr. Langroise: Yes, we are, your Honor.

The Court: You may proceed.

Mr. Langroise: With respect, your Honor, to the pre-trial transcript, we have some corrections that we have agreed upon that should be made in regard to it.

The Court: May I suggest, Mr. Langroise, in making your record, instead of filing that that you restate your stipulations into the record—what you have agreed upon, and make your record accordingly.

Mr. Hawley: Maybe we can indicate the part and read back the transcript and stipulate as we go along.

The Court: You may do it any way you want to, Mr. Hawley. You can take the transcript from the pre-trial and read your stipulations, then you will not have to file that.

Mr. Langroise: That is agreeable to us.

The Court: You may proceed.

Mr. Langroise: I am assuming, if your Honor please, [5*] that a statement on the part of the plaintiff would be of little or no value to the Court.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

The Court: In view of the conference yesterday, the Court has an idea of what this matter involves.

Mr. Langroise: We will proceed with our proof.

The Court: Very well.

Mr. Lagroise: Call Mr. Sewell.

C. A. SEWELL

a witness call on behalf of the plaintiff, having been first duly sworn was examined and testified as follows:

The Clerk: State your name for the record, please.

The Witness: C. A. Sewell.

Direct Examination

By Mr. Langroise:

Q. State your name, please.

A. C. A. Sewell.

Q. You are one of the plaintiffs in this action?

A. I am.

Q. Mr. Sewell, directing your attention to the early spring of 1956, did you have any contact with the then Continental State Bank, which is now the Bank of Idaho, or any of the officers?

A. I did.

Q. And with whom did you talk?

A. W. A. Goodall. [6]

Q. And what position did W. A. Goodall hold with respect to the defendant company, Bank of

(Testimony of C. A. Sewell.)

Idaho? A. He was president.

Q. Do you remember about when that was?

A. Oh, about the twelfth, thirteenth, or fourteenth of April.

Q. And what were you talking to him about?

Mr. Hawley: If your Honor please, I will object unless a proper foundation is laid as to who was present during the conversation, and as to whether or not there were any of the representatives of the defendant Wickahoney present.

Mr. Langroise: I will lay the foundation.

Q. (By Mr. Langroise): Who was present?

A. Goodall and I.

Q. Just the two of you? A. Yes, sir.

Q. Where did this conversation take place?

A. At his desk in the Continental Bank office.

Q. Was this conversation with respect to the contract of purchase of Wickahoney Sheep Company from you of certain personal property?

A. Indirectly, yes.

Q. Now, will you state what was said at that time? [7]

Mr. Hawley: To which I will object, your Honor, that it is hearsay as to the Wickahoney Sheep Company.

The Court: Objection overruled. The Bank of Idaho is a defendant here.

The Witness: I went in to ask Bill Goodall for a loan.

(Testimony of C. A. Sewell.)

Q. (By Mr. Langroise): Just tell us what was said.

A. I said, "Bill, you have a contract of purchase and sale at your bank between the Wickahoney and me. There is a payment due of twenty thousand dollars (\$20,000.00) in October, and I would like to borrow twenty thousand dollars (\$20,000.00) and assign the contract to you for security."

Q. Was there more than one contract you were referring to—more than one contract at that time?

A. I was referring to the escrow. Yes, there was two contracts.

Q. And one of the contracts was for the purchase of the personal property, being the instrument of December 15, 1955? A. Right.

Q. What did Mr. Goodall tell you?

A. He said, "We will get the file out, and we'll write you a letter of what we'll do."

Q. Did you subsequently receive a letter from Mr. [8] Goodall, president of the then Continental State Bank, now the Bank of Idaho?

A. I did.

The Clerk: Marked as plaintiff's exhibit No. 1 for identification.

(The document referred to was marked Plaintiff's Exhibit No. 1 for identification.)

Q. (By Mr. Langroise): Handing you what has been marked Exhibit No. 1 for the purpose of identification, what is that? A. Yes, sir.

Q. Is that the letter you received from Mr.

(Testimony of C. A. Sewell.)

Goodall with respect to the conversation you related you had? A. It is.

Mr. Langroise: We offer it in evidence.

Mr. Hawley: May I see it, please? I have no objection to the document except for the last half of the second last sentence, commencing with, "however, any evidence" to the conclusion of the exhibit; upon the grounds that that portion of the letter is immaterial and irrelevant and not within the issues of the case, and has no materiality at all.

Mr. Langroise: If your Honor please, this letter is with respect to notice on the part of the defendant company, Bank of Idaho, as to the actual notice, in addition to the notice they had of the escrow. [9]

The Court: It may be admitted.

(The document referred to was marked Plaintiff's Exhibit No. 1 and was received in evidence.)

Mr. Langroise: Not, at this time—if you will have that marked, please.

The Clerk: Marked as Plaintiff's Exhibit No. 2 for identification.

(The document referred to was marked Plaintiff's Exhibit No. 2 for identification.)

Mr. Langroise: Mr. Elam, you furnished us this photostatic copy. Is that all you have in the way of a financial statement of the Wickahoney Sheep

(Testimony of C. A. Sewell.)

Company in connection with any of the loans made by the bank?

Mr. Elam: That is right.

Mr. Langroise: We offer it in evidence.

Mr. Hawley: No objection, your Honor.

The Court: It may be marked Exhibit No. 2 and admitted in evidence.

(The document referred to was marked Plaintiff's Exhibit No. 2 and was received in evidence.)

Mr. Langroise: Now, if I might have from the file—I would like to have the mortgages. I will ask that that be marked for identification, please.

The Clerk: Marked for identification as Plaintiff's Exhibit No. 3. [10]

(The document referred to was marked Plaintiff's Exhibit No. 3 for identification.)

Mr. Langroise: And the other two marked also, please.

The Clerk: Marked Plaintiff's Exhibits No. 4 and No. 5 for identification.

(The documents referred to were marked Plaintiff's Exhibits No. 4 and No. 5 for identification.)

Mr. Langroise: At this time, the Plaintiff offers in evidence what has been marked Plaintiff's Exhibit No. 3, being a chattel mortgage, having been executed by the Wickahoney Sheep Company;

(Testimony of C. A. Sewell.)

signed by the president, dated the first of November. We also offer in evidence Plaintiff's Exhibit No. 4, a chattel mortgage from Wickahoney Sheep Company to Continental State Bank, dated the fifth of January, 1957. We offer in evidence Plaintiff's Exhibit No. 5, a chattel mortgage from Wickahoney Sheep Company to the Continental State Bank, dated the twenty-seventh day of November, 1956.

Mr. Hawley: We have no objection to the admission of Exhibits 3, 4 and 5, as Plaintiff's Exhibits in evidence.

The Court: They may be admitted.

(The documents referred to were marked Plaintiff's Exhibits No. 3, No. 4, and No. 5, and were received in evidence.) [11]

Q. (By Mr. Langroise): Mr. Sewell, did you receive fifteen thousand dollars (\$15,000.00) from Wickahoney Sheep Company on October 10, 1956, or at any time? A. No, sir.

Q. When, Mr. Sewell, did you first become advised, if you did become advised, of any chattel mortgage given by the Wickahoney Sheep Company to the Continental State Bank covering the sheep?

A. It was January 2nd or 3rd, 1957.

Q. January 2nd or 2rd of 1957? A. Yes.

Q. Did you give any notice to Wickahoney Sheep Company of purported defaults with respect to the agreement of December 15, 1955?

(Testimony of C. A. Sewell.)

A. Yes, sir.

Mr. Langroise: If you will mark that, please.

The Clerk: Marked as Plaintiff's Exhibit No. 6 for identification.

(The document referred to was marked Plaintiff's Exhibit No. 6 for identification.)

Q. (By Mr. Langroise): Handing you what has been marked as Plaintiff's Exhibit No. 6, I will ask you if that is a copy, or the original of signed copies which were sent of the default [12] notice? A. Yes, sir.

Mr. Langroise: We offer in evidence Plaintiff's Exhibit No. 6.

Mr. Hawley: We stipulated on the admission of that.

Mr. Langroise: Yes.

Mr. Hawley: We have no objection.

The Court: Exhibit No. 6 may be admitted.

(The document referred to was marked Plaintiff's Exhibit No. 6 and was received in evidence.)

Mr. Langroise: I will ask you to have these two marked, if you please.

The Clerk: Marked as Plaintiff's Exhibits No. 7 and No. 8 for identification.

(The documents referred to were marked Plaintiff's Exhibits No. 7 and No. 8 for identification.)

(Testimony of C. A. Sewell.)

Mr. Langroise: At this time, if your Honor please, we offer in evidence Plaintiff's Exhibits 7 and 8, being copies of letters of transmittal to the Continental State Bank, now the Bank of Idaho, and the Wickahoney Sheep Company of the default notice, and, being attached to each the receipt for certified mail and the returned signature card.

Mr. Hawley: We have no objection to Exhibits 7 and 8.

The Court: Exhibits 7 and 8 may be admitted.

(The documents referred to were marked Plaintiff's Exhibits No. [13] 7 and 8 and were received in evidence.)

Q. (By Mr. Langroise): Calling your attention, Mr. Sewell, to plaintiff's exhibit No. 6, and directing your attention to the paragraph number two, I will ask you where you got the figures with respect to that?

A. I got it off of the mortgage.

Q. Handing you Plaintiff's Exhibit No. 4, being the mortgage dated January 5, 1957, I will ask you if that is the mortgage to which you refer that you took the number placed in your default notice?

A. Right.

Q. Mr. Sewell, with respect to the personal property sold, or the sale agreement which was entered into between you and the Wickahoney Sheep Company on December 15, I will ask you whether or not the taxes for the year 1954 were paid?

(Testimony of C. A. Sewell.)

A. Yes, sir.

Q. I will ask you whether or not your prorata share of the taxes for the year 1955 were paid by you?

A. I paid all of the taxes and the Wickahoney Sheep Company refunded their prorata share.

Q. You are talking about the year 1955?

A. Right.

Mr. Langroise: Will you have that marked, please, [14] unless you have the original. The letter from Mr. Hawley to the Bank, dated April 18, 1957.

Mr. Elam: It is there.

Mr. Langroise: Let's mark the original.

The Clerk: Marked as Plaintiff's Exhibit No. 9 for identification.

(The document referred to was marked Plaintiff's Exhibit No. 9 for identification.)

Mr. Langroise: I would like, also, to have marked—have you the original in your files with you here of the letter to Continental State Bank by Mr. Sullivan, dated April 23? I would like to have that marked also as an exhibit.

The Clerk: Marked Plaintiff's Exhibit No. 10 for identification.

(The document referred to was marked Plaintiff's Exhibit No. 10 for identification.)

Mr. Langroise: We offer in evidence Plaintiff's Exhibit No. 9 for identification; being a letter from

(Testimony of C. A. Sewell.)

Jess B. Hawley of the firm of Hawley and Hawley to the Continental State Bank, attention Mr. Claude Miller, president, dated April 18, 1957.

Mr. Hawley: No objection, your Honor.

The Court: It may be admitted.

(The document referred to was marked Plaintiff's Exhibit No. 9 and was received in evidence.) [15]

Mr. Langroise: We offer in evidence Plaintiff's Exhibit No. 10; being a letter addressed to the Continental State Bank, dated April 23, Re: Wickahoney Sheep Company Purchase Agreement, signed by Mr. W. E. Sullivan.

Mr. Hawley: No objection, your Honor.

The Court: Exhibit No. 10 may be admitted.

(The document referred to was marked Plaintiff's Exhibit No. 10 and was received in evidence.)

Mr. Langroise: If I may have that marked, please.

The Clerk: Marked Plaintiff's Exhibit 11 for identification.

(The document referred to was marked Plaintiff's Exhibit No. 11 for identification.)

Mr. Langroise: We offer in evidence Plaintiff's Exhibit No. 11. A letter on the stationery of Hawley and Hawley, signed by J. B. Hawley, it is dated April 6, 1957, addressed to Mr. Orville R. Wilson;

(Testimony of C. A. Sewell.)

Mr. C. A. Sewell, and Mrs. C. A. Sewell, care of Mr. Orville Wilson, First National Bank Building, Elko, Nevada.

Mr. Hawley: No objection, your Honor.

The Court: Exhibit No. 11 may be admitted.

(The document referred to was marked Plaintiff's Exhibit No. 11 and was received in evidence.)

Mr. Langroise: It is my understanding that counsel for the defendants stipulate that all of the personal property [16] described in the contract of December 15, 1955, between C. A. Sewell and Orene Sewell, his wife, and Wickahoney Sheep Company was delivered to Wickahoney Sheep Company as therein described on or about the eighteenth of October, 1955.

Mr. Hawley: We will stipulate to that, your Honor.

The Court: Very well.

Q. (By Mr. Langroise): Mr. Sewell, did you have at the time the notice was sent out, had you had any opportunity to count the number of sheep remaining with the Wickahoney Sheep Company?

A. No, sir.

Q. Now, were you out near the Wickahoney Sheep operation early in January of 1957?

A. Yes, I was there about every week.

Q. When were you first there, do you recall—about when?

(Testimony of C. A. Sewell.)

A. The second or third of January.

Q. At that time, had any of the sheep that Wickahoney Sheep Company had there that they had gotten in the purchase agreement lambed?

A. No, sir.

Q. Do you know when they started to lamb, Mr. Sewell?

A. About the fifteenth of January.

Q. And how long would the lambing period continue?

A. Oh, about thirty days. [17]

Q. Mr. Sewell, have you had any experience in the sheep business?

A. Yes, sir.

Q. And over what period of time?

A. From 1928 to about 1936, and I bought the Coig Outfit in 1952, and ran it until I sold it to the Wickahoney Sheep Company.

Mr. Hawley: Until what?

The Witness: I sold it to the Wickahoney Sheep Company.

Q. (By Mr. Langroise): Do you know whether or not after the lambs are born, they are with their mother and dependent on their mother for food?

A. Yes.

Q. How long do they remain as suckling lambs, if you know?

A. You mean winter lambs?

Q. Yes, January 15 and continuing?

A. When we were running the Sheep Company we sold to the Wickahoney Sheep Company, the lambs stayed on their mother until they were shipped.

Q. And they were on the mother until the time

(Testimony of C. A. Sewell.)

of shipment? A. Right. [18]

Q. When did you generally ship?

A. First of July—started about the first of July.

Q. July 1st? A. Correct.

Q. And when did you normally lamb when you were running the outfit?

A. We normally started to lamb about the middle of January.

Mr. Langroise: Will you, gentlemen, as counsel for the defendant, stipulate that Plaintiff's Exhibit No. 10 was personally delivered by Mr. Sullivan to a Mr. Cunningham, an employee of the Bank of Idaho on the twenty-fourth of April, 1957?

Mr. Hawley: We will so stipulate, your Honor.

Mr. Langroise: Do you stipulate, also, gentlemen, that Wickahoney Sheep Company received a copy of this letter within a few days of the date of April 24?

Mr. Hawley: I don't think we can stipulate that unless we check the file. Do you have a letter of transmittal to Wickahoney?

Mr. Langroise: Will you stipulate, Mr. Hawley, that you received a copy of the letter around the twenty-fourth, or twenty-fifth of April, 1957.

Mr. Hawley: No, I cannot stipulate until I have checked my records. I don't have it in my recollection. I'll [19] check the file, and if I have it, I will so stipulate.

Mr. Langroise: And you, Mr. Haight?

(Testimony of C. A. Sewell.)

Mr. Haight: I will have to check the records, which I do not have here.

Mr. Langroise: That is a copy of it.

Mr. Hawley: What was the date of the Exhibit?

Mr. Langroise: April 23, Mr. Hawley.

The Court: Are we still talking about Exhibit 10?

Mr. Langroise: Exhibit 10, yes, your Honor.

Mr. Hawley: Is that a letter of April 24, 1957?

Mr. Langroise: April 23, Mr. Hawley.

Mr. Hawley: I will stipulate that the letter was—a copy of Exhibit 10 was sent to me, your Honor. The date being unknown to me as to the receipt of the document, but was in a few days of that time.

Mr. Langroise: When you say, “within a few days of that date——”

Mr. Hawley: I could not stipulate. I have the document, and I received it in the regular course of mail, but I do not have the envelope.

Mr. Langroise: Mr. Haight, have you found it?

Mr. Haight: Yes.

Mr. Langroise: And you make a similar stipulation?

Mr. Haight: I have it in the file, but I cannot say when I received it. [20]

Q. (By Mr. Langroise): Mr. Sewell, within ninety (90) days of January 17, did Wickahoney Sheep Company pay to you or your account \$15,000.00?

A. No, sir.

(Testimony of C. A. Sewell.)

Q. Did Wickahoney Sheep Company, within that period, advise you that any replacements had been placed in the band to bring it up to the amount sold by you to them? A. No, sir.

Q. Within that period, did you receive from Continental State Bank any notice of their acknowledgement that their chattel mortgages, which they had on file, were inferior to yours——

A. No, sir.

Q. ——or did they offer to release them?

A. No, sir.

Q. Following the ninety (90) day period, say April 18, 19, 20, did Wickahoney Sheep Company deliver to you or your possession any of the personal property which they were buying from you under the contract? A. No, sir.

Mr. Langroise: Do you have the Receiver's Inventory, Mr. Blaine Austin's?

The Court: I believe it is in the file.

(The document referred to was [21] removed from the Court's file by the Clerk of the Court.)

Mr. Langroise: Will counsel stipulate that the Inventory filed by the Receiver, in this case, Mr. Blaine Austin, being filed on October 25, 1957, is an accurate inventory of the property which was received and an inventory by the Receiver under the Order of the Court?

Mr. Hawley: I will stipulate that that is the inventory as filed with this Court.

(Testimony of C. A. Sewell.)

Mr. Langroise: Do you stipulate that it is the number of sheep; bucks, small lambs, is the number which the Receiver received from the Wickahoney Sheep Company?

Mr. Hawley: I will so stipulate, your Honor.

The Court: Very well.

Mr. Langroise: And may it be understood that we can substitute a copy of the inventory in that respect?

The Court: You may.

Mr. Hawley: I wonder if we may mark and put in evidence a copy of the inventory?

Mr. Langroise: I do not have a copy. Do you have one?

Mr. Hawley: I am sure I have. Mr. Clerk, what date does the inventory bear?

The Clerk: It was filed October 25, 1957, at 2:00 p.m.

Mr. Hawley: Thank you. [22]

Mr. Langroise: That may be marked.

The Clerk: Marked as Plaintiff's Exhibit No. 12 for identification.

(The document referred to was marked Plaintiff's Exhibit No. 12 for identification.)

Mr. Langroise: We offer Plaintiff's Exhibit No. 12 in evidence.

Mr. Hawley: We have no objection, your Honor.

(Exhibit No. 12 received in evidence.)

Mr. Langroise: In so far as the stipulation, the

(Testimony of C. A. Sewell.)

inventory has reference to Exhibit 12, is that correct?

Mr. Hawley: That is a conformed and accurate copy of the Receiver's Inventory?

Mr. Langroise: So far as the stipulations, is the amount received?

Mr. Hawley: The same stipulation will obtain as to the subsequent document, Exhibit 12.

Mr. Langroise: And has reference to it?

Mr. Hawley: Yes.

Mr. Langroise: Counsel, will you stipulate that the only sheep run, or operated by the Wickahoney Sheep Company, were the sheep being purchased under a purchase agreement from Sewell, et al.?

Mr. Hawley: No, your Honor, I cannot so stipulate.

Q. (By Mr. Langroise): Mr. Sewell, when were replacements made, in the [23] sheep industry, for sheep being operated—what time of the year, if you know?

Mr. Hawley: I will object to the question on the basis of its immateriality.

The Court: I am going to permit him to answer.

The Witness: We always put the replacements in in June or July, because we put the bucks in in August.

Q. (By Mr. Langroise): Now, Mr. Sewell, are you familiar with the practice of the industry with respect to the type of replacements used in the operating of the sheep?

(Testimony of C. A. Sewell.)

A. We always put yearlings in.

Q. Are you generally familiar with the fair market value of yearlings used for the replacement during June or July or August of 1956?

A. I think they were worth twenty-four or twenty-five dollars a head.

Q. Now, directing your attention to the year 1957, were you familiar with the fair market value of year old ewes for replacement in July or August of that year?

A. I don't think the value changed much from the year before.

Q. And the fair market value would be——

A. Twenty-four or twenty-five dollars.

Mr. Langroise: Now, if we can have the Interrogatories [24] of Wickahoney Sheep Company?

The Clerk: What is the date?

Mr. Langroise: They were filed on October 22, 1957, I believe. I would like the answers if I might have them. We offer in evidence the summary of sales with reference to Wickahoney Sheep Company. May I read it into the record?

The Court: Is there any objection?

(Off the record discussion by Court and Counsel.)

The Court: I assume, Mr. Langroise, that you are going to introduce the summary of sales?

Mr. Langroise: We offer it in evidence.

The Court: Will you identify it, please?

(Testimony of C. A. Sewell.)

Mr. Langroise: Yes, your Honor. We offer Exhibit "A" attached to the Interrogatory of the Wickahoney Sheep Company; designated "A Summary of Sales," showing date, sold to, description, and amount as designated.

Mr. Hawley: In respect to Interrogatory No. 11, which should be read into the record to tie it in.

Mr. Langroise: "Interrogatory No. 11: Have any of the ewes or bucks being sold to Wickahoney Sheep Company by the plaintiff under that certain purchase agreement dated December 15, 1955, between C. A. Sewell and Orene H. Sewell, husband and wife, and Wickahoney Sheep Company, a copy of which purchase agreement is attached as Exhibit 'A,' or any of [25] the lambs or increase thereof, or any of the wool obtained from the same been sold, and if so, what was sold and to whom, and on what date, and what was the sale price for each of said sales?"

Mr. Hawley: We have no objection to the admission of Exhibit "A" of the Interrogatory. Do you want to pull that? I may have a true copy of it.

Mr. Langroise: We have a copy. May we use that?

Mr. Hawley: Yes.

The Clerk: Marked as Plaintiff's Exhibit No. 13 for identification.

(The document referred to was marked Plaintiff's Exhibit No. 13 for identification.)

(Testimony of C. A. Sewell.)

Mr. Langroise: We offer Plaintiff's Exhibit No. 13 in evidence as the summary and answer to Interrogatory No. 11, which has been read into the record.

Mr. Hawley: We stipulated the Interrogatories, we have no objection.

The Court: It is now marked Exhibit 13, and may be admitted.

(The document referred to was marked Plaintiff's Exhibit No. 13 and was received in evidence.)

Mr. Langroise: We offer in evidence Interrogatory No. 23, addressed to the Wickahoney Sheep Company as follows: "Does Wickahoney Sheep Company own any sheep, or is it [26] purchasing any sheep on contract, or otherwise, other than the ewes and bucks and the lambs and the increase thereof, described in the Purchase Agreement, dated December 15, 1955, between C. A. Sewell and Orene Sewell, husband and wife, as sellers, and the Wickahoney Sheep Company as the purchasers; copy of which purchase agreement is attached as Exhibit "A," and a description of such sheep?" To which interrogatory the Wickahoney Sheep Company answered, "No."

Mr. Hawley: No objection, your Honor.

The Court: Mr. Langroise, we will take a ten minute recess.

(Testimony of C. A. Sewell.)

(Whereupon the Court recessed for ten minutes.)

The Court: You may proceed, gentlemen.

(Mr. Sewell resumed the stand.)

Mr. Langroise: May I have that marked, please?

The Clerk: Plaitiff's Exhibit No. 14 marked for idetification.

(The document referred to was marked Plaintiff's Exhibit No. 14 for identification.)

Mr. Langroise: At this time, if your Honor please, with respect to the Interrogatory to the Bank of Idaho, I would like to offer Interrogatory No. 7. "If any of said loans, or any part thereof, made by the Bank of Idaho to Wickahoney Sheep Company have been paid by Wickahoney Sheep Company, [27] from what source did the Wickahoney Sheep Company obtain such money to make such payment?" And the answer, "Reference is made to the Schedule of Loans attached to show how payment was made by Wickahoney Sheep Company and from what sources Wickahoney Sheep Company obtained the money to the extent such information is available from the records of the Bank of Idaho." In that connection, we offer in evidence Plaintiff's Exhibit No. 14, being a Schedule of the Payments made and from what sources.

Mr. Hawley: May I enquire, Mr. Langroise, was

(Testimony of C. A. Sewell.)

there an additional third sheet which encompasses the Schedule of Loans?

Mr. Langroise: Yes, there is. Do you want that?

Mr. Hawley: Yes. Will you attach that? I have no objection to the admission of the interrogatories.

The Court: Exhibit 14 may be admitted.

(The document referred to was marked Plaintiff's Exhibit No. 14 and was received in evidence.)

Mr. Langroise: I will ask you to mark this as Plaintiff's Exhibit for identification, No. 15.

The Clerk: Marked for identification as Plaintiff's Exhibit No. 15.

(The document referred to was marked Plaintiff's Exhibit No. 15 for identification.)

Mr. Langroise: Counsel, we hand you Plaintiff's [28] Exhibit No. 15 for identification, which is a copy of the Assignment of Purchase, and I hand you an executed copy of the assignment by C. A. Sewell and Orene Sewell, and assignment of purchase being dated the twenty-seventh of June, 1956.

Mr. Hawley: We will stipulate that the document is a true and correct copy of the Assignment of Purchase Agreement.

Mr. Langroise: We offer it in evidence.

The Court: Any objection?

Mr. Hawley: No, your Honor.

(Testimony of C. A. Sewell.)

The Court: It may be admitted.

(The document referred to was marked Plaintiff's Exhibit No. 15 and was received in evidence.)

Mr. Langroise: Counsel, it is stipulated that the animals and other personal property——

Mr. Hawley: Where are you reading from?

Mr. Langroise: Page 5. I am re-phrasing it; being described in the Contract of Sale between C. A. Sewell and his wife, and Wickahoney, remained in the possession of Wickahoney until the Receiver took possession.

Mr. Hawley: Excepting those that were sold, we so stipulate.

Mr. Langroise: And that Wickahoney sold?

Mr. Hawley: Yes.

Q. (By Mr. Langroise): Mr. Sewell, I am not quite sure—it may be [29] duplication if I asked whether you ever received the \$15,000.00 on October 10, 1956, from Wickahoney or any other source?

A. No, sir.

Q. Did Wickahoney or anyone turn over to you the sheep and other personal property described in the Purchase Agreement of December 15, 1955, prior to, or at the time suit was filed by you with others against the Wickahoney Company and the Bank of Idaho? A. No, sir.

Q. Mr. Sewell, are you familiar with or acquainted with John Clay and Company?

A. Yes, sir.

(Testimony of C. A. Sewell.)

Q. Who are they?

A. They are a livestock commission firm.

Q. Are they well known?

A. They operate on every large market in the country and they also buy on orders throughout the country.

Q. Were you familiar with the fair market value of lambs during the summer, or during July and August of 1957? A. Yes, sir.

Q. Have you any opinion as to whether, for 1,173 lambs, a fair market price would be \$25,713.31? A. How much is that a head?

Q. I have not computed that. [30]

A. What was the price?

Q. One thousand one hundred seventy-three head, \$25,713.31.

A. That is about \$22.00 a head. I think it was.

Q. You think that would be a fair market price?

A. Yes, sir.

Q. I will ask you if on July 6, 1957, whether in your opinion a fair market price for 1,086 lambs would be \$22,357.13?

A. Twenty-two thousand, what?

Q. Twenty-two thousand three hundred fifty-seven dollars thirteen cents.

A. I think so.

Q. I will ask you, Mr. Sewell, whether or not, in your opinion, on August 14, the fair market value of 1,327 lambs would be \$24,470.38?

(Testimony of C. A. Sewell.)

The Court: You are talking about 1957, Mr. Langroise?

Mr. Langroise: Yes, your Honor, thank you, for 1957.

The Court: What was the number of head?

Mr. Langroise: Thirteen twenty-seven.

The Court: For how much money?

Mr. Langroise: Twenty-four thousand four hundred seventy dollars thirty-eight cents.

Q. (By Mr. Langroise): Have you an opinion on that? [31]

A. I think that would be a fair market value.

Q. I will ask you, on or about the 15th of August—about that date—within a week, of 1957, whether the fair market price for 689 lambs would be \$11,869.68.

A. I think so. That is about \$17.00 plus a lamb.

Q. You think that would be a fair market value?

A. Yes.

Q. Were you, generally, in the year 1957 familiar with the market price of wool?

A. Yes, sir.

Q. I will ask you whether or not the fair market price of 30,119 pounds of wool, that is March 19, 1957, would be \$17,017.20, in your opinion?

The Court: What was the figure?

Mr. Langroise: Seventeen thousand seventeen dollars twenty cents.

Mr. Hawley: May I inquire at this point, is

(Testimony of C. A. Sewell.)

this his answer to an interrogatory and the answer that is in evidence?

Mr. Langroise: Yes.

Mr. Hawley: We might refer to that.

Mr. Langroise: I am tying it into Exhibit 13.

The Witness: I think that was a fair price.

Q. (By Mr. Langroise): I will ask you whether or not you were familiar [32] with the general fair market value of pelts along in April—April 19, 1957? A. Yes, sir.

Mr. Langroise: I am unable to give you the amount sold. I will have to withdraw the question, I don't know how many were sold at that time. If I might have the Inventory of the Appraiser, please?

The Court: No. 12.

Q. (By Mr. Langroise): Mr. Sewell, do you recall whether or not among the personal property described in the Sales Agreement between you and Wickahoney, there was included in it any automobiles or a pickup?

Mr. Hawley: I believe the best evidence, your Honor, would be the Inventory.

The Court: He may answer that, "yes or no." He asked if he recalled. You may answer the question, Mr. Sewell.

The Witness: Yes, sir.

Q. (By Mr. Langroise): And what type of motor vehicle was being sold in the contract?

A. It was an International truck.

(Testimony of C. A. Sewell.)

Q. Describe it, if you please?

A. I believe it was a 1952 2-ton with a two speed [33] axle.

Q. And in what condition was it?

A. It had a new motor in it a short time prior to that.

Q. Would it be the one described in Exhibit "B," attached as a 1954 11½ ton International?

A. That could be, I thought it was a 1952.

Q. Was that the only vehicle being sold under the terms of the contract?

A. It was.

Q. Have you any opinion as to the fair market value of that vehicle?

A. I think it was worth——

Mr. Hawley: I will object unless he fixes a time.

The Court: Yes, if you will fix a time, Mr. Langroise.

Q. (By Mr. Langroise): Have you an opinion as to the fair market value of that vehicle on April 20, 1957?

A. Yes, sir.

Q. What, in your opinion, was the fair market value of it?

A. I think it was worth \$1,000.00.

Mr. Langroise: Counsel, with respect to the instruments, we are agreeing, and the Bill of Sale, that was [34] escrowed with the Continental State Bank, or Bank of Idaho as the name now is. Do you stipulate that they were not returned pursuant to the demand of the Plaintiff to the Plaintiff?

(Testimony of C. A. Sewell.)

Mr. Hawley: Yes, we will so stipulate that they were not returned and the Bill of Sale was deposited in the registry of the Court and not returned to the Plaintiff.

Mr. Langroise: If your Honor pleases, that completes our direct examination of Mr. Sewell.

Cross-Examination

By Mr. Hawley:

Q. Mr. Sewell, when did you last see the 1954 truck as having a value of \$1,000.00, in your opinion, as of April 1957?

A. It was probably late in the winter of 1955.

Q. You had made no inspection subsequent to that time? A. No, sir.

Q. You have testified as an expert in connection with the values of sheep.

Mr. Hawley: That exhibit that your Honor was making reference to, was that 12, the Inventory?

The Court: Yes.

Q. (By Mr. Hawley): Handing you what has been marked as Exhibit 13, [35] Mr. Langroise questioned you with respect to that exhibit, do you have any quarrel that the amount received for the sales of various items on there were not sold at the fair market value at the time?

A. The question before, you asked if I was an expert. I am not an expert.

Q. You have had thirty years in the sheep business?

(Testimony of C. A. Sewell.)

A. It makes quite a difference, though.

Q. We won't be legalistic about it. Since 1928 you have been in the sheep business?

A. I was in from '28 to '36, and then again in 1952 to '56.

Q. And was that your principal source of livelihood during that period?

A. I have been in the livestock business. I had cattle, too.

Q. You have been in the business during the period you stated, and made your livelihood as a result of that? A. Right.

Q. And you have bought and sold livestock?

A. Right.

Q. And you have bought and sold sheep. Now, referring to Exhibit 13, I will ask you whether or not you have any quarrel on the proceeds of the items that you testified to Mr. Langroise as being the fair market value. [36]

The Court: I think it is Exhibit No. 12 that you want, Mr. Hawley.

Mr. Hawley: It is No. 13, your Honor.

The Court: Very well.

The Witness: No.

Q. (By Mr. Hawley): So they all went at the fair market value at the time when they were sold?

A. That is what I think.

Q. Now, with respect to ewes, is a high value with a ewe at one year?

(Testimony of C. A. Sewell.)

A. Well, I think probably the highest would be two year old ewes.

Q. Two years old? A. Yes, sir.

Q. And where is the breaking point, at two, the breaking point where the values decrease?

A. No.

Q. Where is the breaking point?

A. I would say four or five—four, possibly.

Q. In 1956, what was the difference in value between a standard average four year old ewe, and a five year old ewe?

A. Oh, probably three or four dollars a head.

Q. Would the same spread obtain between a five year old ewe and a six year old ewe? [37]

A. No.

Q. What would it be?

A. Oh, a dollar or so.

Q. Would it be as much as two dollars?

A. I don't think so.

Q. How much—a dollar seventy-five?

A. A dollar and a half, I'd say.

Q. And how about the spread between a six and seven year old ewe?

Mr. Langroise: I will object, if your Honor please, as not being proper cross examination.

The Court: Objection sustained.

Q. (By Mr. Hawley): Now, you testified in answer of a question by Mr. Langroise that at no time did you get back the sheep, and on the second question, you testified that at no time prior to the

(Testimony of C. A. Sewell.)

filing of the suit, or at the time of filing of the suit, did we turn back the sheep to you, is that correct? A. That's right.

Q. Do you recall on or about the twenty-first, or twenty-second, or twenty-third of August, receiving a letter from Ciriaco Lezamiz, president of Wickahoney Sheep Company?

A. What year are you talking about?

Q. 1957. [38]

A. I received a letter. He delivered it in person.

Mr. Hawley: Do you have the original of that letter, Mr. Langroise?

Mr. Langroise: No, I don't have.

Mr. Hawley (Directing question to Mr. Wilson in the Court Room): Do you have the original of that letter, it would be August of 1957?

The Clerk: Marked as Defendant's Exhibit No. 16 for identification.

(The document referred to was marked Defendant's Exhibit No. 16 for identification.)

Q. (By Mr. Hawley): Handing you what has been marked for identification as Defendant's Exhibit No. 16, would you state whether or not that is a letter, or an executed counter-part of the letter, which you received on or about the date of August 21, 1957? A. Yes, I got this.

Mr. Hawley: We offer Defendant's Exhibit 16 into evidence.

Mr. Langroise: To which we object, if your Honor please, on the grounds it is irrelevant, im-

(Testimony of C. A. Sewell.)

material and incompetent for the purposes here; written long after the suit and the sale of everything except the few remnants he left.

Mr. Hawley: He testified he never, at any time, had—— [39]

Mr. Langroise: No——

The Court: The objection will be sustained. His testimony was that the sheep were not returned to him on demand or before the beginning of the suit.

Q. (By Mr. Hawley): I will ask you, if at any time, the defendant Wickahoney Sheep Company tendered to you any of the personal property involved in the purchase contract?

Mr. Langroise: To which we object, if your Honor please, as not being material, and incompetent.

The Court: Objection sustained. Your question has to go prior to the lawsuit, Mr. Hawley.

Mr. Hawley: Very well, your Honor. I will pass on to another field.

Q. (By Mr. Hawley): You have testified, Mr. Sewell, with respect to the escrow, and I believe you testified, if I am correct, that there were two agreements set up in the escrow; is that correct—you said two contracts? A. That's right.

Mr. Hawley: May I have those documents marked, please?

The Clerk: Marked Defendant's Exhibits No. 17 and No. 18 for identification.

(Testimony of C. A. Sewell.)

(The documents referred to were marked Defendant's Exhibits No. 17 and No. 18 for identification.) [40]

Mr. Hawley: We will offer them merely as the original executed documents. They are part of the pleadings.

Mr. Langroise: We have no objection to 18. We do object to Defendant's Exhibit 17 on the grounds that it is immaterial, irrelevant, and incompetent to any of the issues here.

Mr. Hawley: He testified, your Honor, and we offer them. Eighteen, it is stipulated that it be admitted, being a Purchase Agreement dated December 15, 1955.

The Court: Is that the agreement we are talking about here?

Mr. Hawley: Yes, and Exhibit 17—

Q. (By Mr. Hawley): Is that an executed original of the other agreement that was deposited in escrow that you have testified to?

The Court: The record may show Exhibit 18 has been admitted.

(The document referred to was marked Defendant's Exhibit No. 18 and was received in evidence.)

The Witness: The two agreements I am talking about was 18, that one, and the one that pertains to the real estate.

Q. (By Mr. Hawley): Handing you what has

(Testimony of C. A. Sewell.)

been marked as Defendant's [41] Exhibit No. 17, is that the one that pertains to the real estate?

A. No.

Q. It does not? A. No.

The Clerk: Marked as Defendant's Exhibit No. 19 for identification.

(The document referred to was marked Defendant's Exhibit No. 19 for identification.)

Q. (By Mr. Hawley): You are being handed Defendant's Exhibit No. 19 for identification, can you state whether or not that is the escrow Agreement that bears your signature, and the document which you have testified about which were escrowed? A. That's right.

Mr. Hawley: We offer it.

Mr. Langroise: On behalf of whom?

Mr. Hawley: We offer it as an exhibit.

Mr. Langroise: We object, if your Honor please, that it is irrelevant, and immaterial, and it is incompetent for the purpose of superseding the agreement between the Wickahoney Sheep Company and Mr. Sewell, or the plaintiff here, and also, object on the further ground that it is immaterial and irrelevant so far as the Bank of Idaho is concerned for the reason that the Bank of Idaho is here, not with respect [42] to their failure to deliver to us the escrow papers, and the contract between Sewell and Wickahoney and the Bank, but are here because of the receiving of monies and the conversion of property.

(Testimony of C. A. Sewell.)

The Court: Exhibit No. 19 will be admitted for what it is worth.

(The document referred to was marked Defendant's Exhibit No. 19 and was received in evidence.)

Mr. Hawley: Under that qualification, it appears to be a legal question.

Mr. Langroise: What is the date of the escrow agreement?

The Clerk: The 15th of December, 1955.

Mr. Langroise: Thank you.

Q. (By Mr. Hawley): Exhibit No. 6, admitted in evidence, is the Notice of Default. Mr. Sewell, this notice was mailed directly by you to the interested parties, is that correct?

A. Mailed by my attorney.

Q. That is Mr. Wilson, a party plaintiff in the litigation? A. Yes, sir.

Q. Mailed by him to the interested parties?

A. I signed them in his office.

Q. And they were not mailed by the Bank, is that [43] correct? A. Which bank?

Q. The Continental Bank, or the Bank of Idaho.

A. By the Bank?

Q. Not mailed by the bank—the Bank of Idaho, is that correct? A. That's right.

Q. Now, referring again to the Notice of Default, which is Exhibit No. 6 in evidence, you have specified three items of default: Failure to pay \$15,000.00 on October 10, 1956; depletion of ewes

(Testimony of C. A. Sewell.)

and bucks to 3,718 from 4,005 ewes and 82 bucks; and item 3, the placing of the chattel mortgage by Wickahoney—the four chattel mortgages on the property—isn't that true? A. That's right.

Q. And you specified no other items of default, is that correct?

A. I believe that is correct.

Q. And have given no other formal notice of default, other than that, the extent, is that true?

A. That's correct.

Q. I will ask you if it is your contention that the placing of the mortgages constitutes a default in the agreement?

Mr. Langroise: We object, if your Honor please, as calling for a conclusion of the witness. The instrument speaks [44] for itself.

The Court: The objection will be sustained.

Q. (By Mr. Hawley): Now, Exhibit 18, the Purchase Agreement which is in evidence, does not specify anything with respect to wool or increase, is that correct?

Mr. Langroise: We object, if your Honor please, the instrument speaks for itself.

The Court: Objection sustained.

Q. (By Mr. Hawley): Now, you spoke and testified in answer to Mr. Langroise's questions in connection with a normal time for replacement in the herd, and I believe you testified that replacements would occur to the summer prior to bringing the bucks in, is that right?

(Testimony of C. A. Sewell.)

A. That's right.

Q. Approximately when in the year?

A. Well, we always put the bucks in about the first ten days of August, and we brought the yearling ewes in in July.

Q. What is the purpose of replacement?

A. To keep your herd up.

Q. Well, is a herd ordinarily depleted?

A. Sheep get old.

Q. Are you talking only about the normal attrition [45] by virtue of death or catastrophe?

A. I am talking about all of the hazards of the sheep business.

Q. What is customary? And you were testifying of the customs, and what customs ordinarily obtain with respect to the sale of old or broken mounted ewes?

Mr. Langroise: I will object as being irrelevant and immaterial.

The Court: He may answer.

Q. (By Mr. Hawley): What is the custom that prevails in the industry with respect to ewes that have gone over the hill?

A. They are taken out of the herd.

Q. How are they taken out?

A. Physically taken out.

Q. What is that?

A. Physically taken out.

Q. By sale? A. Surely.

(Testimony of C. A. Sewell.)

Q. What happens in a custom of the industry with respect to lambs?

Mr. Langroise: Object, if your Honor please, as being immaterial for any purpose.

Mr. Hawley: It is very material. The contract, which speaks for itself, is silent as to the [46] matter.

The Court: The man has only testified as to replacement. It may be part of your case, but it is not proper cross-examination.

Mr. Hawley: I will defer to that ruling.

Q. (By Mr. Hawley): This was a Coig Outfit that you sold, I believe you testified it?

Mr. Langroise: I object, if your Honor please, as being improper cross-examination.

The Court: He may answer.

The Witness: That's right.

Q. (By Mr. Hawley): And the Coig Outfit, was that a spread running twenty-five hundred head?

A. When I purchased it, I purchased two thousand three hundred sixty head of ewes.

Q. And you then added to that?

A. Right.

Q. To bring it up to something in excess of four thousand involved in the present purchase?

A. That's right.

Q. Did you make a count of the sheep at the time you sold them to Wickahoney?

Mr. Langroise: Object, if your Honor please,

(Testimony of C. A. Sewell.)

as not being proper cross-examination and not material under the [47] stipulation.

The Court: He may answer.

The Witness: My foreman made the count.

Q. (By Mr. Hawley): You personally didn't make the count? A. No.

Mr. Hawley: I believe that is all.

Mr. Langroise: No further questions.

The Court: That is all, Mr. Sewell.

(Witness left the stand.)

The Court: Before you call your next witness, Mr. Langroise, we will recess for lunch until 2:00 o'clock this afternoon.

(Whereupon the Court recessed at 12:00 o'clock.) [48].

April 10, 1958—2:00 o'Clock P.M.

The Court: You may proceed, Mr. Langroise.

Mr. Langroise: Call Mr. Sullivan, please.

W. E. SULLIVAN

a witness called on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, please, for the record.

The Witness: W. E. Sullivan.

(Testimony of W. E. Sullivan.)

Direct Examination

By Mr. Langroise:

Q. Your name, please?

A. W. E. Sullivan.

Q. You are one of the attorneys for the defendant in the action? A. I am.

Mr. Hawley: I will stipulate his qualifications, your Honor.

Q. (By Mr. Langroise): Handing you Plaintiff's Exhibit No. 10, I believe that is a letter which you wrote? A. It is.

Q. And after the letter was written, what did you do with it?

A. The original letter, on April 24, the day following [49] the date of the letter in 1957, I delivered personally to Mr. Cunningham at the Bank of Idaho in Boise.

Q. Were any copies of that letter sent to anyone else? A. Yes, there were.

Q. And when, and to whom, and in what manner?

A. They were mailed on April 24, 1957, by regular mail, postage pre-paid. A copy was sent to Orville Wilson, attorney at law at Elko, Nevada; a copy to Charles Sewell at Elko; a copy was mailed to Wickahoney Sheep Company, the defendant, and addressed to the designated office in the Continental Bank Building in Boise; and a copy to Lloyd Haight, attorney at law, at the Con-

(Testimony of W. E. Sullivan.)

tinental Bank Building in Boise; and a copy to Jess Hawley of the firm of Hawley and Hawley, attorneys at law, in the Eastman Building, in Boise.

Q. Mr. Sullivan, at about this time, and prior to the filing of this action by the plaintiff, did you have any conversation with Mr. Hawley concerning the delivery of the possession of the sheep involved in this action? A. Yes.

Q. Do you remember when it was?

A. In the latter part of April, 1957, as I recall—it may have been early in May—I think the end of April.

Q. And where did that take place? [50]

A. In Mr. Hawley's office in the Eastman Building.

Q. And was the conversation as the attorney for the Wickahoney Sheep Company?

A. It was.

Q. And what was said at that time?

A. I asked Mr. Hawley, at that time, if the Wickahoney Sheep Company was going to turn over the property and the sheep to Mr. Sewell.

Q. And what was his answer?

A. Mr. Hawley said, "No, they were not." It was the position of the company that there was no default.

Cross-Examination

By Mr. Hawley:

Q. Did you make notes of the conversation of April of 1957? A. Nineteen fifty-seven?

(Testimony of W. E. Sullivan.)

Q. Did you make notes of the conversation?

A. No.

Q. You are testifying from your recollection?

A. Yes, sir.

Mr. Hawley: I have no further questions.

Mr. Langroise: That is all.

(The witness left the stand.)

Mr. Langroise: If your Honor please, we would like to call Circiaco Lezamiz, president of the Wickahoney Sheep [51] Company, under cross-examination.

The Court: Very well.

CIRCIACO LEZAMIZ

a witness called on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name for the record, please.

The Witness: Circiaco Lezamiz.

The Clerk: Will you spell it, please?

The Witness: C-i-r-c-i-a-c-o L-e-z-a-m-i-z.

Cross-Examination

By Mr. Langroise:

Q. State your name, please.

A. The name?

Q. Yes, please, A. My name?

Q. Yes. A. Circiaco Lezamiz.

(Testimony of Circiaco Lezamiz.)

Q. And are you the Lezamiz mentioned as the president of the Wickahoney Sheep Company?

A. Yes, sir.

Q. And were you the manager of the Wickahoney Sheep Company in October of 1955, and on?

A. Manager or president, yes.

Q. Manager and president. Mr. Lezamiz, did the Wickahoney Sheep Company, from October 18, 1955, to the time [52] that the Receiver took possession of the personal property of Wickahoney Sheep Company ever buy any replacements for sheep?

A. No, sir.

Q. Did Wickahoney Sheep Company operate during that time any sheep other than the sheep that were being purchased from Mr. Sewell, and the issue of it?

A. Please?

Q. Did you understand?

A. No, I don't.

Q. Did Wickahoney Sheep Company from the period October 18, 1955, to the time that the Receiver took possession of the personal property, in October of 1957, did they operate any sheep, or run or own any sheep, or have any sheep, other than the sheep they were buying from Sewell?

A. No.

Q. During that time did they have any wool, or sell any wool, other than the wool from the sheep that were being purchased from Mr. Sewell, or the issue of them?

A. During from where?

Q. October 18, 1955, down to the time that the

(Testimony of Circiaco Lezamiz.)

Receiver took possession? A. Yes.

Q. Did they have any wool from any other sheep, other than the sheep being purchased from Sewell? [53]

A. No, sir.

Q. All of the lambs that were sold in 1957 by Wickahoney Sheep Company were the lambs from the sheep being purchased from Sewell?

A. Yes, sir.

Q. At the time that the Receiver, Mr. Blaine Austin, came down to take possession under the Order of the Court of the personal property, including the sheep of Wickahoney Sheep Company, do you remember that? A. Yes.

Q. Did you, at that time, deliver to him, or turn over, all of the sheep that the Wickahoney Sheep Company had? A. Yes.

Q. And all of the personal property?

A. Yes, sir.

Mr. Langroise: You may inquire.

Direct Examination

By Mr. Hawley:

Q. Mr. Lezamiz, were there any ewes added to the sheep which were involved in the purchase contract? A. Mr. Hawley, I cannot—

Q. Were there any ewes—

Q. Were there any ewes— A. Yes.

Q. —that were added to the band of sheep that came from other sources? [54]

(Testimony of Circiaco Lezamiz.)

A. Any other? Q. Yes.

A. Twenty-five or thirty head we raised at home.

Recross-Examination

By Mr. Langroise:

Q. And those you raised at home are from the increase of the Sewell sheep? A. Yes, sir.

Mr. Langroise: That is all.

(The witness left the stand.)

The Court: Call your next witness, Mr. Langroise.

Mr. Langroise: Call Mr. Blaine Austin.

BLAINE AUSTIN

a witness called on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Blaine Austin.

Direct Examination

By Mr. Langroise:

Q. Your name? A. Blaine Austin.

Q. Mr. Austin, are you the receiver appointed by the Court in connection with the Wickahoney Sheep Company? A. Yes, sir.

Q. As a result of your appointment by the [55] Court, did you take possession of the personal property of the Wickahoney Sheep Company?

(Testimony of Blaine Austin.)

A. Yes, sir.

Q. When did you do that? A. October 9.

O. Of what year?

A. October 9, 1957—eight or nine—I'm not sure.

Q. And at that time, did you take possession of all the property that you could find at Wickahoney Sheep Company? A. Yes, sir.

Mr. Langroise: May I have the copy of the Receiver's Report?

Mr. Hawley: The Inventory?

The Court: No. 12.

Mr. Langroise: Exhibit 12, thank you.

Q. (By Mr. Langroise): In the Inventory which you returned into the Court as the Receiver's Report, did you list all of the property which you took as a Receiver of the Wickahoney Sheep Company? A. Yes, sir.

Q. Now, Mr. Austin, I wonder if you have your Record here of Sale that you made of any of the property? A. Yes, sir. [56]

Q. Now, with respect to the sheep themselves, I wonder if you would advise us of what you sold in the fall; do you want your Record?

A. Please.

(The witness left the stand to get his records which were in the Court Room.)

Q. (By Mr. Langroise): How many sheep did you take possession of, first—would you like the copy? A. Yes, may I have the Inventory?

(Document handed to the witness.)

(Testimony of Blaine Austin.)

A. I took three thousand one hundred eighty-seven ewes, one hundred small lambs, forty-four bucks, eight work horses, eight saddle horses, one milk cow, and one yearling.

Q. Tell us, what you did, if anything—did you sell the ewes, the lambs, and the bucks?

A. Yes, sir.

Q. When did you sell them, and for what price?

A. On November 3, I sold four hundred forty-one (441) aged ewes at \$13.00 per head.

Q. For a total of how much?

A. Five thousand seven hundred thirty-three dollars (\$5,733.00). I sold one hundred ten (110) small lambs; weight seven thousand seven hundred twenty-five (7,725) pounds at eighteen cents per hundred weight. One thousand three [57] hundred ninety dollars fifty cents (\$1,390.50).

Q. And when was that?

A. That was the same day.

Mr. Hawley: What was the date?

Mr. Langroise: November 3.

Q. (By Mr. Langroise): Now, with respect to the two sales, in your opinion were they the fair market value for those that you sold? A. Yes.

Q. Will you go on?

A. On November 9, I sold two hundred eighty-five (285) old ewes, weight thirty-four thousand three hundred seventy pounds (34,370) at \$7.75 per hundred weight.

Q. For a total?

A. A total amount of two thousand six hundred sixty three dollars sixty-seven cents (\$2,663.67).

(Testimony of Blaine Austin.)

That same date I sold sixteen (16) bucks at \$21.00 per head for a total of—no—eighteen (18) bucks at \$3.00 per head. Sixty-four (64) old ewes at \$10.00 a head.

Q. What was the total for the bucks?

A. Three dollars for the bucks. These items are together—eighteen bucks at \$3.00 per head, that is fifty-four dollars (\$54.00); I sold sixty-four ewes at \$10.00 per head. That check was for six hundred ninety-four dollars [58] (\$694.00).

Q. And was that a fair market value for them at that time, in your opinion? A. Yes, sir.

Q. And next?

A. I sold two thousand three hundred and thirty-four (2,334) ewes at \$21.00, and sixteen (16) bucks and forty-one (41) wethers. The amount was forty-nine thousand eight hundred forty-two dollars (\$49,842.), f.o.b. Wickahoney Ranch.

Q. And, Mr. Austin, on what date was that?

A. That sale was November 24th.

Q. And was that, in your opinion, a fair market value for those? A. Yes, sir.

Q. Mr. Austin, are you familiar, generally, with the operation of sheep—sheep operations?

A. Yes, sir.

Q. And how long have you been?

A. Born and raised with them.

Q. Are you familiar with the operation in Owyhee County of sheep? A. Yes, sir.

Q. And when do they normally lamb in that area, if you know? A. January and February.[59]

(Testimony of Blaine Austin.)

Q. Now, after the ewes lamb, how long does the lamb remain with the mother?

A. You mean the lamb?

Q. Yes, sir.

A. Generally until shipping time.

Q. And is fed, that is with the mother and separated at shipping time? A. That's right.

Q. Are you familiar, generally, with the replacement of bands of sheep during operations——

A. Yes, sir.

Q. ——that are in that area? A. Yes, sir.

Q. And what is the practice with respect to replacement?

Mr. Hawley: If the Court please, I will object that there is no proper foundation as to the replacement or in what kind of a situation.

The Court: He may explain what he means.

The Witness: Yearling ewes is the proper replacement.

Q. (By Mr. Langroise): Yearling ewes?

A. That is the rule, generally, ewes—yearling ewes.

Q. Now, during the summer of 1956, say in July or August, are you familiar with the market price of yearling [60] ewes——

A. Yes, sir.

Q. ——in that area?

A. Not particularly in that area, but Idaho.

Q. That would include Owyhee County?

A. Yes, sir.

(Testimony of Blaine Austin.)

Q. And what was the fair market value, in your opinion?

A. Twenty-four dollars or twenty-five dollars per head.

Q. Now, directing your attention to 1957, the year 1957, are you familiar with the fair market value of yearling ewes in Idaho and the area of Owyhee County?

A. Yes, sir.

Q. And what would be the fair market value of ewes at that time?

A. Twenty-six dollars was the prevailing price in 1957 for the yearling ewes.

Q. Mr. Austin, I neglected to ask you, with respect to the two hundred eighty-five (285) ewes that were sold on November 9, at seven seventy-five (\$7.75); two thousand six hundred sixty-three dollars sixty-seven cents (\$2,663.67), would that, in your opinion, be the fair market value at that time?

A. Yes, sir.

Q. And I do not know whether I asked you [61] if the sale of eighteen (18) bucks at \$3.00 and sixty-four (64) ewes at \$10.00 was a fair market value at the time they were sold?

A. Yes, sir.

Mr. Langroise: That is all, you may inquire.

Cross-Examination

By Mr. Hawley:

Q. Mr. Austin, the ewes you sold November 3 and November 9, totaling seven hundred twenty-six (726) ewes——

A. Yes, sir.

Q. ——in your opinion, at that time they were

(Testimony of Blaine Austin.)

sold to be practically worthless? A. No, sir.

Q. You never made that statement?

A. No, sir.

The Clerk: Marked as Defendant's Exhibit No. 20 for identification.

(The document referred to was marked Defendant's Exhibit No. 20 for identification.)

Q. (By Mr. Hawley): Referring to Exhibit No. 20 for identification, did you write that letter to me? A. Yes, sir.

Mr. Hawley: I would like to offer Defendant's Exhibit No. 20 in evidence.

Mr. Langroise: The only objection, if your [62] Honor please, I don't think it proper in the proceedings.

Mr. Hawley: It's for impeachment.

The Court: It may be admitted for what it is worth.

(The document referred to was marked Defendant's Exhibit No. 20 and was received in evidence.)

Q. (By Mr. Hawley): Now, in connection with the four to six hundred ewes, that you said are broken mouthed, were you able to estimate the age of the ewes?

Mr. Langroise: That is not a correct statement of the letter. The letter should be handed to him.

Mr. Hawley: It is a correct statement of the letter. Will you hand it to the witness, please?

(Testimony of Blaine Austin.)

Q. (By Mr. Hawley): Don't you say in the letter, that there are four hundred to six hundred ewes with broken mouths and old?

A. That's right.

Q. What were the ages?

A. I couldn't tell you.

Q. How do you tell the age of sheep?

A. By mouthing.

Q. Did you mouth them? A. Yes.

Q. And what did you ascertain?

A. Broken mouthed ewes. [63]

Q. And you said you tell the age of them by mouthing; did you have an opinion as to the age?

A. You can't tell after a certain time.

Q. What is the age which, generally, you can't tell how much older they are?

A. There are different opinions, and it differs from the country and conditions.

Q. Under the conditions prevailing on the range, are you familiar? A. Yes, sir.

Q. All right.

A. It would be difficult to tell over a five or six year old.

Q. It would be hard?

A. When it's a solid mouthed.

Q. Once a ewe is five or six years of age, you can't tell how much older they are?

A. Not actually, no.

Q. At that time, did you make an estimate of the age of the four to six hundred ewes?

A. Yes, sir.

(Testimony of Blaine Austin.)

Q. And what did you estimate the ages at?

A. I couldn't estimate after they are solid mouthed ewes. It's practically impossible to estimate the age.

Q. Would you say they were over six years of age? [64]

A. Yes, sir.

Q. Could they have been seven years of age?

A. Yes, sir.

Q. Could they have been eight years of age?

A. Yes, sir.

Mr. Langroise: Objection, if your Honor please, as being improper cross-examination.

The Court: He has answered. It may stand.

Q. (By Mr. Hawley): Would you say they could have been eight years of age?

A. Could have been, yes.

Q. Nine years of age?

A. I won't go that far, Jess, a nine year old ewe—I give up.

Q. At that point they are gone over——

A. Over the hill.

Q. Yes. What was the gross receipts from your Receivership with respect to the liquidation of the Inventory?

A. I think it's sixty-nine thousand—I have it.

Q. Do you have the exact figures?

A. Yes, sir. I can get the exact figures. You have a copy and all of the rest.

Q. I am not certain. I would appreciate your getting the exact figure. [65-66]

A. Now?

Mr. Hawley: Yes, sir.

(Testimony of Blaine Austin.)

(The witness left the stand to get the document in question, in the Court Room.)

Q. (By Mr. Hawley): May I ask what document you are making reference to, Mr. Austin?

A. Sir?

Q. What document are you referring to to refresh your recollection?

A. To my deposit in the bank, and the sales I made in December of hay, the grain, the oats, trucks, pickups, and the different stuff listed.

Q. You don't have a Summary Sheet showing the accounting? A. Right here.

Q. All right. If you would not mind, I hate to consume the time, your Honor, but I would like to get the basic figure in the record.

Mr. Langroise: May I ask a question?

The Court: Yes, you may.

Voire Dire Examination

By Mr. Langroise:

Q. The last sale that you referred to in December, Mr. Austin, the proceeds of that sale, did you get it? [67]

A. It was turned over to the bank—the First Security Bank.

Q. And it was under mortgage to the First Security Bank? A. Yes, sir.

Q. And the Receiver did not receive any money from that?

(Testimony of Blaine Austin.)

Mr. Hawley: I object, if the Court please, the question calls for a conclusion.

The Court: Are you trying to get a value of the property, Mr. Hawley, at the time this property was alleged to have been turned over?

Mr. Hawley: That is one reason.

The Court: I think you have a lot of property in the receivership. There may be some question.

Mr. Hawley: And the other matter is that this is a lawsuit for damages, and this is something which the Receiver got in his possession, and I want to find out how much he got.

Mr. Langroise: We put in no Proof with respect to anything other than the sheep, Mr. Hawley.

The Court: This Receiver is going to put in a final report of what he received and sold. Now, I don't know what you are trying to get at.

Mr. Hawley: I do have a purpose, your Honor.

The Court: There is a lot of property that [68] has been sold. I believe you claim it was not a part of the original property sold, and some property which has not been sold.

Mr. Hawley: Yes, your Honor, but they are suing for the return of all of the property, or the sum of two hundred twenty-five thousand dollars (\$225,000.00). In connection with the allegation of the complaint——

The Court: It is material so far as the property in the contracts.

Mr. Hawley: That is what I am limiting it to.

(Testimony of Blaine Austin.)

The Court: But you are not.

Mr. Hawley: That is what I meant in the question.

The Court: Let us tie it to that.

Cross-Examination

(Continued)

By Mr. Hawley:

Q. Mr. Austin, in your figures, will you compute only the property that was in the Purchase Agreement, which will include the sheep?

A. I don't know, was it in——

Q. Handing you what has been marked——

A. I can give you the actual sales and the amount of money.

Q. We want what was involved in the Purchase Agreement.

The Court: If he has the amount that was sold.

Mr. Hawley: In other words, he will itemize it.

The Court: What he did, and what he got.[69]

Q. (By Mr. Hawley): Would you itemize what you sold, what you got for it, when you sold it, and to whom you sold it? A. Yes, sir.

Q. Just read from your——

A. I can read from the deposit slip.

Q. We have to identify it.

A. I will have to go through it here and—four hundred forty-one (441) aged sheep sold to E. C. Warren of Burley, Idaho, at \$13.00 per head, five thousand seven hundred thirty-three dollars, (\$5,733.00).

(Testimony of Blaine Austin.)

Q. And the date? A. November 3rd.

Q. Proceed.

A. One hundred ten (110) lambs, weighing seven thousand seven hundred twenty-five pounds (7,725) at \$18.00 per hundred weight, one thousand three hundred ninety dollars fifty cents (\$1,390.50), to Golden Moffit.

Q. With respect to the bucks, the lambs, and the sheep you have testified to that. A. Yes.

Q. And exclude the matters you have testified to, and limited to those you have testified about.

A. That is all of the sales I have made.

Q. You have justified to the sale of bucks, [70] lambs, and ewes, haven't you, you have given those figures? A. Yes, sir.

Q. Eliminate those figures and give us the figures from the other items sold, other than what you have just testified to.

A. You want the machinery, hay and grain? That is all I sold, right there.

Q. All right. A. You give you——

Mr. Langroise: As far as the machinery is concerned, and as far as the plaintiff, that was none of the machinery under the Purchase Agreement, and we have put in no Proof.

The Court: I am going to let him testify and determine whether it is material later on.

The Witness: We sold to Mr. Chester Loveland approximately three hundred seventy-two point nine seven (372.97) tons of alfalfa hay, and that was fourteen dollars (\$14.00) per ton. The amount was five

(Testimony of Blaine Austin.)

thousand two twenty-one dollars fifty-eight cents. (\$5,221.58). Approximately one hundred bushels of oats, that is \$720.00. One 1955 Chevrolet 2-ton truck, two thousand dollars (\$2,000.00); one 1951 Chevrolet pickup truck, five hundred dollars (\$500.00); approximately nine hundred bales of straw, at \$1.00 per bale; total sales, nine thousand three forty-one dollars fifty-eight cents (\$9,341.58). [71]

Q. (By Mr. Hawley): That figure added to the figure that you testified to as to the sheep receipts constitutes the total receipts of the Receiver at this time? A. Yes, sir.

Q. And you would have in your possession, you would have in your possession the balance of the Inventory as disclosed in Exhibit 12, except the items you have sold? A. That's right.

Mr. Hawley: That is all.

Redirect Examination

By Mr. Langroise:

Q. The nine thousand three hundred forty-one dollars fifty-eight cents (\$9,341.58) being the last sale you made. Did the Receiver get the money?

A. No, sir. It was turned over to the First Security Bank of Boise to apply on the loan—on the note—a mortgage of the materials.

Q. On a mortgage of the materials, given by the Wickahoney Sheep Company? A. Yes, sir.

Q. Now, in the culling of sheep, Mr. Austin, do you cull for things other than age?

(Testimony of Blaine Austin.)

A. Oh, yes, very definitely.

Q. What do you cull for? [72]

A. Constitution, quality and condition.

Q. And is that what you did with respect to the sheep after you got possession of them?

A. Yes, sir.

Q. And that was the reason for the culling?

A. Yes, sir.

Mr. Langroise: That is all.

Recross-Examination

By Mr. Hawley:

Q. And in your culling, you sell and dispose of the sheep culled, is that correct? A. Sir?

Q. It is customary practice when you clean out a herd to sell and dispose of the sheep that you have culled out, is that right? A. That's right.

Q. Now, what is the average loss in bands of sheep, if you know, in that area, from a normal shrinkage in the flock or the band?

Mr. Langroise: We object, if your Honor please, that it is immaterial and incompetent, and not proper cross-examination.

The Court: Objection sustained.

Mr. Hawley: I have no further questions.

Mr. Langroise: That is all, thank you, Mr. Austin. [73]

(The witness left the stand.)

Mr. Langroise: Mr. Clerk, would you mark as a

Plaintiff's Exhibit this Chattel Mortgage that I overlooked this morning?

The Clerk: Marked as Plaintiff's Exhibit No. 21 for identification.

(The document referred to was marked Plaintiff's Exhibit No. 21 for identification.)

Mr. Langroise: We offer that in evidence.

Mr. Hawley: We have no objection to its admission.

The Court: It may be admitted.

(The document referred to was marked Plaintiff's Exhibit No. 21 and was received in evidence.)

Mr. Langroise: Now, Counsel, with respect to Plaintiff's Exhibit 3, 4, 5, and 21——

Mr. Hawley: Which are?

Mr. Langroise: Mortgages given by Wickahoney Sheep Company to Continental State Bank, now the Bank of Idaho. It is stipulated that they are the only mortgages received by Continental State Bank from the Wickahoney Sheep Company?

Mr. Elam: Are they set forth——

Mr. Hawley: In the answer?

Mr. Langroise: Yes.

Mr. Hawley: And the answers to the interrogatories?

Mr. Langroise: Yes. [74]

Mr. Hawley: We will so stipulate.

The Court: Very well.

Mr. Langroise: Now, with respect, Mr. Elam and

Mr. Hawley, Exhibit No. 2 of the Plaintiff's is a copy furnished by the Bank under an Order to Produce. It is stipulated that that is the only financial statement by the Wickahoney Sheep Company to the Continental State Bank in connection to any loans which they made to the Wickahoney Sheep Company?

Mr. Elam: That is the only one that was found. That is all we know about.

Mr. Langroise: And you will stipulate that is the only one?

Mr. Elam: To the best of our knowledge, yes.

Mr. Hawley: That was submitted in an interrogatory.

Mr. Langroise: No, on an Order of Production, and that is the only one you could produce?

Mr. Elam: Yes, sir.

Mr. Langroise: We subpoenaed Mr. Miller, duces tecum, to produce photostatic copies of the drafts that went through the Bank, and by the Bank applied to any debt of Wickahoney Sheep Company. Mr. Miller advised that they have the film but do not have the enlarger set up here. However, he advises that he is having one of their employees view these. I have talked with Mr. Elam to see whether this is correct. What they find on those, from viewing, you will [75] stipulate to?

Mr. Elam: The subpoena was not served until this morning, and it would take four or five days to get the material out of Salt Lake City, however, we did say we would get the view on the micro-film and

would submit such data as appeared on the drafts.

Mr. Hawley: What about photostats?

Mr. Elam: They cannot get them for four or five days.

Mr. Langroise: When they furnish that, and it is put in this afternoon, with that, I believe the Plaintiff rests.

The Court: Is that satisfactory, that when you get the information it may be put in?

Mr. Elam: Yes, your Honor. We are not trying to withhold anything.

The Court: With that understanding, the Plaintiff rests?

Mr. Langroise: That is correct, your Honor.

Mr. Hawley: Your Honor, at this time I would like to move for a dismissal of the lawsuit of the Plaintiff's upon the grounds and for the reason that the Plaintiff has failed, at this time, to submit any evidence at all, and not a single bit of evidence in connection with the expenses that would result from operating four thousand sheep—ewes and rams [76]—or the subject matter of the Purchase Contract which is in litigation. They have sued for a return of the possession of all the personal property, or the sum of two hundred twenty-five thousand dollars (\$225,000.00), which they have alleged to be the reasonable value, or the value of the sheep and the property. And in connection with the general rule of damages for breach of contract, it is a part of the Plaintiff's case, not only to show the value of their damage, but also to show, in a situation of this nature, the cost to them in maintaining, and keeping,

grazing, and caring for a herd of sheep. I refer to the Court to a Supplemental Memorandum which I have filed in the case. In the lawsuit, without bothering to paraphrase or quote from any of the decisions, and I might mention that in Idaho the case of Molineau vs. the Twin Falls Canal Company makes it clear that it is the obligation of the Plaintiff to establish——

The Court: This being a Court case, your motion will be denied.

Mr. Elam: It is understood that the motion is made on behalf of the Bank, as well as Wickahoney Sheep Company. Mr. Hawley is appearing as attorney for both.

The Court: The motion will be denied as far as the Bank is concerned, too. We will recess for ten minutes, gentlemen.

(Whereupon the Court recessed for ten minutes.) [77]

The Court: You may proceed, Mr. Hawley.

Mr. Hawley: Call Mr. Lezamiz, your Honor.

The Court: Very well.

CIRCIACO LEZAMIZ

a witness previously having testified in this case, was recalled for further examination.

Direct Examination

By Mr. Hawley:

Q. Mr. Lezamiz, you have been previously sworn in this case. A. Yes.

(Testimony of Circiaco Lezamiz.)

Q. Will you take the stand? You have been previously identified as President of Wickahoney Sheep Company since it started in 1955? A. Correct.

Q. Now, Mr. Lezamiz, what is your background with respect to sheep operations?

A. What is my background?

Q. What is your experience?

A. It's twenty-four years working in the sheep.

Q. Will you speak up?

A. My experience in the sheep is working with the sheep twenty-four years.

Q. And has that been in the State of Idaho?

A. Yes, sir. [78]

Q. And with what outfit were you first involved?

A. Bruneau Sheep Company.

Q. And how long were you with the Bruneau Sheep Company? A. Sixteen years.

Q. And is that in the Bruneau Area of Idaho?

A. Owyhee County, yes.

Q. And when did you terminate your employment with Bruneau Sheep Company?

A. 1955.

Q. And at or about what time did you first become aware of the Sewell Spread?

A. Some time in the year 1955—July or August.

Q. And would you state whether or not, at that time, you made any contact with Mr. Swell, or he made contact with you?

A. No, I made contact with Mr. Sewell.

Q. Where was that?

(Testimony of Circiaco Lezamiz.)

A. At his ranch, the Blue Creek Ranch.

Q. Blue Creek? A. Right—ranch.

Q. And did he have the sheep and the spread, and the equipment that are involved in the lawsuit at Blue Creek at that time?

A. At that time, no, sir. [79]

Q. Did you have any discussion with him looking, or negotiations looking toward acquiring his spread?

Mr. Langroise: Object, if your Honor please, it is immaterial and irrelevant.

The Court: He may answer “yes” or “no.”

The Witness: If—

The Court: Answer the question “yes” or “no.”

The Witness: I don’t understand, please, you repeat?

Q. (By Mr. Hawley): At that time, did you have any talk with Mr. Sewell, looking toward the possible purchase of his outfit? A. Yes.

Q. And can you state whether or not he was or was not interested in selling?

A. Well, he give me the answer—he say, “I’ll let you know a day or so later.”

Q. Subsequently, did he get in touch with you?

A. I went to see him about two or three days later and he give me the answer then.

Q. What was the answer? A. “Yes.”

Q. Now, prior to entering the agreement, which is in evidence, did you make any inspection of the herd?

(Testimony of Circiaco Lezamiz.)

A. I looked all that sheep—how shape is the sheep, [80] how shape the camp equipment.

Q. Did you inspect the sheep individually?

A. What you mean, individually?

Q. One by one. A. No, sir.

Q. Did you mouth the sheep? A. No, sir.

Q. Now, did you have any discussion with Mr. Sewell, and if you did, state when and where it took place with respect to the ages of the sheep?

A. Yes.

Q. And where did the discussion take place?

A. Right in his place in Blue Creek Ranch.

Q. And approximately what date?

A. Oh, sometime in about the month of September in 1955.

Q. And what was said between you at that time?

Mr. Langroise: We object, if your Honor please, it is irrelevant and immaterial, and incompetent for any purpose. The contract is the best evidence.

Mr. Hawley: If your Honor please, this goes to the matter of the affirmative defense and the Cross Complaint, and the Court is entitled to hear all of the Defendant's facts and the circumstances, and the inducement and the representation, if any, that were made. [81]

The Court: I am going to reserve the ruling and let him testify.

Mr. Langroise: My objection may go to all of this?

The Court: Yes, it may.

(Testimony of Circiaco Lezamiz.)

Q. (By Mr. Hawley): Mr. Lezamiz, will you state what was said to you by Mr. Sewell at that time?

A. What Mr. Sewell said at that time, about what?

Q. The last question.

A. The age of the sheep?

Q. Yes.

A. From yearling to five years old.

Q. Now, do you know where Mr. Sewell acquired the spread originally? A. Yes, sir.

Q. And what spread was that?

A. What area—where he run the sheep?

Q. No, from whom did he acquire the operation?

A. To who?

Q. From whom did he buy it?

A. Mr. Sewell, from who he got the outfit?

Q. Yes.

A. From Coig.

Q. Is that C-O-I-G?

A. I think so. [82]

Q. And did you have any discussion with Mr. Sewell with respect to range for the sheep?

Mr. Langroise: May I interrupt? I would like, for the minute, to ask one or two questions in aid of a further objection.

The Court: You may do so.

(Testimony of Circiaco Lezamiz.)

Voire Dire Examination

By Mr. Langroise:

Q. Mr. Lezamiz, was a contract entered into with respect to a range or the purchase of land, a written agreement by Wickahoney? You understand?

A. No, I don't.

Q. Was there a contract between Wickahoney Sheep Company and Mr. Sewell and his wife, separate and distinct from the purchase of the contract of the sheep; and was there any contract?

A. By range?

Q. Yes. And the leasing of land and the option to purchase? A. Yes, there was.

Q. Mr. Lezamiz, that contract, after it was entered into by the Wickahoney Sheep Company, was it assigned by the Wickahoney Sheep Company to the Ruby Company?

Mr. Hawley: I object, if the Court please, that it is immaterial, and irrelevant, and not within any of the issues [83] of the case.

Mr. Langroise: The reason for the question, if your Honor please, there was an assignment and we would like a copy of the assignment, and if the Wickahoney Sheep Company is not interested, Wickahoney are not the real parties in interest.

The Court: He may answer the question, if he can answer it. Was it assigned to the Ruby Company?

The Witness: No, never as far as I am con-

(Testimony of Circiaco Lezamiz.)

cerned. Never a contract between Ruby Company and Wickahoney Sheep Company.

Q. (By Mr. Langroise): Do you know, Mr. Lezamiz, did Mr. Haight tell you that there was an assignment of that to the Ruby Company?

Mr. Hawley: I object, it is immaterial and irrelevant.

The Court: I don't know whether it is. He may answer.

The Witness: No.

Mr. Langroise: Mr. Hawley, did you not contend that there was an assignment of the other contract to the Ruby Company? Let me ask you——

Mr. Hawley: I am going to make the objection to the question; that is as far as I am willing to go.

The Court: If it is a fact, the Court cannot [84] rule unless he knows the fact. The Court understood there was an assignment, and a lease in the contract.

Mr. Hawley: They are in evidence.

The Court: The Court wants to know when, if it was.

Mr. Hawley: I don't think that is a proper question of this witness.

The Court: If we are going into things extraneous, the Court should know the facts before it can rule, that is the whole point.

Mr. Hawley: Would you mark this?

The Clerk: Marked as Defendant's Exhibit 22.

(The document referred to was marked Defendant's Exhibit No. 22 for identification.)

(Testimony of Circiaco Lezamiz.)

Mr. Hawley: In the interest of the observation that the Court would like to have the matter resolved, I feel with this witness it is immaterial. I offer the assignment, Defendant's Exhibit No. 22.

Mr. Langroise: We have no objection, if your Honor please.

The Court: Exhibit 22 is admitted.

(The document referred to was marked Defendant's Exhibit No. 22 and was received in evidence.)

Mr. Hawley: And, at this time, in view of the fact that the Assignment is in evidence, pursuant to the request of Mr. Langroise, I would reoffer—would you hand Exhibit [85] No. 17 to the witness?

Direct Examination

(Continued)

By Mr. Hawley:

Q. Is that the land lease to which you had reference in your testimony, would you check that and determine whether your signature appears at the end of that? A. Yes, this is my signature.

Q. And is that the Land Lease that went with this deal that you have talked about?

A. I think it is.

Mr. Hawley: We reoffer Defendant's Exhibit 17.

Mr. Langroise: To which we object, that it is irrelevant and incompetent, and it appears that the Exhibit, which is Exhibit 22, that the Wickahoney Sheep Company no longer has any interest in the

(Testimony of Circiaco Lezamiz.)

contract, and there was no reservation of any right by reason of the assignment by the Wickahoney Company to the Ruby Company, and in those conditions, they are not the real party and interest.

The Court: I am going to admit the Exhibit for the purpose of tying it in with the Assignment. As far as any interrogation on the question you started out on, Mr. Hawley, I wonder what the question has to do with the lawsuit. The lease belongs to the Ruby Company.

Mr. Hawley: The complaint of the Cross Complaint is directed to the misrepresentations of the Plaintiff Sewell and [86] Wilson as to the ages of the sheep, and the matter of the grazing rights, and the base land being adequate to sustain and hold the sheep which are the subject of the Purchase Contract, and the Court is entitled to hear all of the relevant facts and circumstances relating to the question.

The Court: I am going to hear you. I have some doubt about it. I am going to reserve my ruling.

Q. (By Mr. Hawley): Mr. Lezamiz, referring back to the conversations you had with Mr. Sewell, what was said by him with respect to range rights?

Mr. Langroise: Our objections run to all of this, if your Honor please.

The Court: The Court will reserve the ruling.

Mr. Langroise: May it be understood, if your Honor please, that the objection may run to all of this?

The Court: Yes, it may.

(Testimony of Circiaco Lezamiz.)

Q. (By Mr. Hawley): You may answer.

A. You was asked me what Mr. Sewell said?

Q. Yes. A. When?

Q. When did you first talk to him about it?

A. He said he was going to give us grazing rights—the sheep and the right he got—Clog's outfit, or whatever [87] you call it.

Q. And do you know how many sheep the Coig Outfit could run?

A. Mr. Sewell gave me it—forty-five hundred ewes' rights.

Q. Now in connection with those rights, did Mr. Sewell make any statement to you in connection with additional A U M's? A. Later on, he was.

Q. And what statement did he make to you, and when was this?

A. I think it was in October, 1955, I don't remember just exactly the days between the fifth to the tenth, I believe, when we closed the deal.

Q. And what was the conversation?

A. About the rights?

Q. Yes.

A. Well, he was telling us the Coig's Corporation Rights and I was telling—there would not be enough territory to run all the forty-five hundred sheep.

Q. In connection with there not being enough—Mr. Langroise: Could he finish the answers?

Q. (By Mr. Hawley): Have you finished?

A. Not quite. [88]

Q. Then finish.

A. I was complaining that we don't have enough

(Testimony of Circiaco Lezamiz.)

grass to run the forty-five hundred sheep, and he told me that he can make some kind of a deal with us to put in five hundred steers in Bull Creek and give us some rights in his range.

Q. Now, with respect to the property which was leased in accordance with Exhibit No. 17, was that enough grass to run the four thousand head of sheep on for the year, was it enough range?

A. Well, we got enough rights, but the range—we wanted more—more grass.

Q. Now, did you have enough grass with grazing rights and the leased ground to run four thousand sheep on a year 'round operation?

Mr. Langroise: To which we object, if your Honor please, that the representations that the witness has said they had enough.

The Court: The objection is sustained. They had enough, but wanted more, is what he said.

Mr. Langroise: That is correct.

Q. (By Mr. Hawley): Did Mr. Sewell say anything to you at that time in connection with giving you additional grass, grazing rights, or base land?

Mr. Langroise: I object as being leading. [89]

The Court: Objection sustained.

Q. (By Mr. Hawley): Did Mr. Sewell make any statement to you at that time in connection with what he would do?

A. He says he will sell to us more rights so we can have sufficient, you know, enough grass to run all four thousand sheep. Yes.

(Testimony of Circiaco Lezamiz.)

Q. Did he ever provide you with that additional land or grazing rights?

A. I don't follow you quite, where you go, Mr. Hawley.

Q. Well, I believe you just testified that he said you would have enough to run four thousand sheep on.

The Court: The witness said, that he would sell the rights.

The Witness: He tell us that he would sell us eight hundred A U M's, and said what was coming from the Coig Corporation.

Q. (By Mr. Hawley): And the Coig lands are described in Exhibit 17, which is the lease, is that true?

Mr. Langroise: The Exhibit speaks for itself, your Honor.

The Court: He may answer that question. I don't know whether it describes the lands or not. [90]

Mr. Langroise: I didn't hear you, your Honor.

The Court: It probably describes the land. He may answer the question, if he knows whether that is the land.

The Witness: I can give you the answer if I can hear a question.

Mr. Hawley: Will you read the question, please?

(The Reporter read the question as follows:
"Question: And the Coig lands are described in Exhibit 17, which is the lease, is that true?")

Q. (By Mr. Hawley): Did you answer the——

(Testimony of Circiaco Lezamiz.)

A. Not quite. Seventeen is what, please? You asked me the question?

Q. I will ask you again. I just showed you Exhibit 17, the Lease of the Land.

A. That's right.

Q. Is that the land you referred to as the Coig Lands? A. Right.

Q. Now, with respect to the eight hundred A U M's, you are familiar, generally, with the grazing laws and the grazing operations?

A. Yes, I am.

Q. In connection with the eight hundred A U M's, can you tell us whether or not this property was necessary to support the eight hundred A U M's on the public domain? [91]

A. It's necessary, and I said there was enough rights, but we wanted more grass.

Q. And when you say, "there were enough rights——" A. Yes.

Q. "——are rights of any use to a sheep man unless they are attached to base lands?"

Mr. Langroise: Objection, if your Honor please, as being irrelevant and immaterial for any purpose.

Mr. Hawley: I think it is material. We are getting into a subject that needs explanation.

The Witness: I can understand some what you asked me, Mr. Hawley, can you repeat the question for me, please?

Q. (By Mr. Hawley): You previously testified: "Sewell said he would sell you eight hundred A U M's of rights. A. That's right.

(Testimony of Circiaco Lezamiz.)

Q. Now, rights in your experience and knowledge and background as a sheep man, rights cannot stand alone, can they; they have to be attached to base lands?

A. He got the base land where the eight hundred A U M's—

Q. I didn't hear that.

A. I did said he got the eight hundred A U M's with the base land.

Q. And what was that base land? [92]

Mr. Langroise: May I ask a question in aid of an objection?

The Court: Yes, you may.

Voire Dire Examination

By Mr. Langroise:

Q. Mr. Lezamiz, was a memorandum agreement entered into in connection with the eight hundred A U M's, was there an agreement signed?

A. Yes, sir. There was a signed agreement between us.

Mr. Langroise: Would you produce the original, please?

Mr. Hawley: Yes. I will offer it as our exhibit.

The Clerk: Marked as Defendant's Exhibit 23 for identification.

(The document referred to was marked Defendant's Exhibit No. 23 for identification.)

Mr. Langroise: I object to any testimony on it,

(Testimony of Circiaco Lezamiz.)

if your Honor please, the agreement will speak for itself.

The Court: It is not in evidence yet.

Mr. Hawley: We will offer Exhibit 23 into evidence.

Mr. Langroise: We have no objection, other than the fact that it is irrelevant and immaterial, and the proper parties are not involved; other than we have no objection.

The Court: It may be admitted with that understanding. [93]

(The document referred to was marked Defendant's Exhibit No. 23 and was received in evidence.)

Direct Examination
(Continued)

By Mr. Hawley:

Q. Handing you Defendant's Exhibit No. 22, can you state whether that is the agreement which has been referred to with respect to transferring the eight hundred A U M's?

A. September 17, I thought we was talking about that which you show—that Assignment—the Agreement—this is different, this is 23.

Q. That is Exhibit 23. Now, Mr. Lezamiz, I was asking you if an agreement was signed in connection with the eight hundred A U M's. That Exhibit has been admitted, and I ask you if that is the agreement you referred to as having been executed, or signed, by the parties?

(Testimony of Circiaco Lezamiz.)

A. I see my signature here, right.

Q. That is not a——

A. It's my signature—I don't know——

Q. I didn't get the answer.

A. The signature is mine, yes.

Q. Now, referring just to Exhibit 17, which is the Lease of the Lands which you say are the Coig Lands, was there any summer range in that?

Mr. Langroise: To which we object, your Honor. The instrument will speak for itself. [94]

The Court: Objection sustained.

Mr. Hawley: The instrument describes the land, but does not mention if it is summer or winter range.

The Court: He may answer the question. Whether there was or was not.

The Witness: You were asking about the eight hundred A U M's, or the whole land?

Q. (By Mr. Hawley): Was there sufficient summer range to hold the four thousand sheep that are the subject matter of the contract?

Mr. Langroise: I object that the witness has testified that there was some.

Mr. Hawley: He answered—he said there was some, and I want to know how much.

Mr. Langroise: He testified that they had enough for the four thousand, and all he wanted was the addition.

The Court: He may answer.

The Witness: If there was enough summer range for the four thousand, that is what you asked me?

(Testimony of Circiaco Lezamiz.)

Q. (By Mr. Hawley): Yes, in the original Lease, Exhibit 17.

A. Well, never is enough—like I said a while ago, we wanted more.

Q. Did you, in fact, get additional summer range from Mr. Sewell? [95] A. From this lease?

Q. No. Did you, in fact, get additional summer range from Mr. Sewell, over and above what is described in Exhibit 17, the Lease?

A. Besides that?

Q. Yes. A. No.

Q. Did you ever lease any grass from him, or grazing rights?

A. Oh, yes sir. Yes, we did.

Q. When was that?

Mr. Langroise: Object, if your Honor please, as being incompetent, irrelevant and immaterial.

The Court: Objection sustained.

The Witness: May I answer the question?

Mr. Hawley: No. The objection was sustained, you cannot answer that.

The Court: Are you putting in Exhibit 23, Mr. Hawley, or do you want to put it in?

Mr. Hawley: That Agreement, Defendant's Exhibit No. 23, recites: "Whereas it is contemplated by the parties that additional grazing rights shall be transferred from Sewells to Wickahoney Sheep Company, said grazing rights to be in addition to those covered by said Lease and Option." Can you state, whether in fact, additional rights were [96]

(Testimony of Circiaco Lezamiz.)

transferred to Wickahoney Sheep Company by Mr. Sewell?

Mr. Langroise: We object, if your Honor please, that it is irrelevant, immaterial, incompetent, and the Agreement, Exhibit 23, has a date of the 18th of October, 1955; some two months prior to the purchase contract, the subject matter of this suit.

Mr. Hawley: If the Court please, perhaps the Court should read Defendant's Exhibit 23.

The Court: You better put it in evidence. It has not been offered yet.

Mr. Hawley: I offer it, it is not marked yet.

The Court: It may be admitted.

(The document referred to was marked Defendant's Exhibit No. 23 and was received in evidence.)

Mr. Hawley: The instrument contemplates affirmative action on the parties of the Agreement. When I asked the question—in regard to the last question—in fact, were any additional rights transferred pursuant to the Agreement, it is material, and goes to the question of misrepresentation in the lawsuit, which is the matter of the cross complaint of the lawsuit.

Mr. Langroise: The only misrepresentation we have heard, is from Counsel, and not the witness, and he has not been sworn yet.

The Court: It does not go to the representation or [97] fraud. The objection will be sustained.

Q. (By Mr. Hawley): Now, referring back to

(Testimony of Circiaco Lezamiz.)

your examination of the herd, after you went into possession, did you ever dispose of any of the ewes—sell any of the ewes?

A. We bought the outfit in '55, and in the year '56—in the fall, we did sell some old ewes.

Q. Did you sell any ewes in the spring of '56?

A. Spring of '56; no, sir.

Q. In the fall, you said? A. Right.

Q. Did you sell any ewes later?

A. Later in when?

Q. After the fall of '56.

A. No. We sold only ewes once—just once, in the fall.

Q. And do you recall approximately how many were sold?

A. Two hundred six, if I remember right.

Q. How do you tell the age of the ewes?

A. By look at the mouth—I look in the mouth.

Q. With respect to the two hundred ewes, could you state whether or not you made an examination of them prior to selling? A. Yes, I will. [98]

Q. And did you mouth them?

A. Yes, I did.

Q. And will you state what you observed as to the age of those ewes?

A. Well, there was some of it broken mouthed, and some of it was ruptured and blue bags.

Q. Now, does rupture and blue bags have anything to do with age? A. No, sir.

Q. How about a broken mouth condition?

A. I say there was some broken mouth.

(Testimony of Circiaco Lezamiz.)

Q. And with respect to those two hundred ewes, were you able to make any determination as to their age at that time?

A. Yes, I think so. Some of it was the old sheep and was sold because of the rupture, and the blue bags. Because to the broken mouth, I can't say how old was the ewes. I'm not certain enough to say how old is the ewes.

Q. Did you make any observation of the age of the broken mouthed ewes?

Mr. Langroise: The witness testified he could not tell.

The Witness: Still, I repeat, at the time the ewe is broken mouthed, could be five, could be six, could be seven, could be eight; I don't know how old because they was [99] broken mouthed—just broken mouthed.

Q. (By Mr. Hawley): Have you ever made any statement to anyone in connection with the age of those two hundred sheep.

A. Given a statement to anyone?

Q. Yes. A. To you.

Q. Was anybody else there?

Mr. Langroise: I don't think this is proper direct examination, if Your Honor please.

Mr. Hawley: I am just determining, your Honor, whether the witness——

The Court: Are you trying to impeach your own witness?

Mr. Hawley: Well, I may ask that he be a hostile

(Testimony of Circiaco Lezamiz.)

witness. You took the deposition, Mr. Langroise, and had him in your office.

The Court: He may answer. Was anyone in there?

Q. (By Mr. Hawley): Was there anyone else present when you were talking to me?

A. Mr. Lloyd Haight was there.

Q. Do you recall making any statement that at least one hundred of the sheep were eight years old or better?

Mr. Langroise: Objection, if your Honor please, as [100] improper direct examination.

The Court: He may answer.

The Witness: Still, I repeat, eight years old or older—like I said—maybe there was five year old or two years old. I don't know, Mr. Hawley, **how old** the sheep was. There was two hundred sheep with broken mouths. I can't give you the answer of how old they were.

Q. And you didn't make any statement as to the age of one hundred ewes when you were discussing——

A. If I tell you the age?

Q. Yes.

A. Maybe I tell you there was six or eight, or maybe older, and that is the statement I give to you.

Q. With respect to the eight hundred A U M's, referred to in Exhibit 23, do you know what base property those rights were originally attached to?

A. I think so.

Q. And what base property?

Mr. Langroise: We object, if your Honor please,

(Testimony of Circiaco Lezamiz.)

as being immaterial, and irrelevant, and incompetent.

The Court: He may answer.

The Witness: This base come on a big hill out there, from Nit Creek. [101]

Q. (By Mr. Hawley): Is that N-I-T?

A. I don't know—I think so.

Q. And do you know who owned the Bull Creek and the Nit Creek property, of your own knowledge?

A. At that time, yes.

Q. Who did? A. Mr. Sewell.

Q. Now, you recall talking with me yesterday afternoon, don't you, in my office?

A. Yes, sir.

Q. And with Mr. Haight? A. Right.

Q. And Mr. Richard Anderson? A. Right.

Q. And, do you recall at that time and place, making any statement to the effect that the lands that you acquired, plus the 800 A U M's, were insufficient to hold and carry those four thousand ewes without getting more grass?

Mr. Langroise: To which we object, it is hearsay, if your Honor please.

The Court: Objection sustained.

Mr. Hawley: If your Honor please, I am actually laying a foundation for the impeachment purposes.

The Court: You cannot lay a foundation [102] for impeachment, Mr. Hawley, you can lay a foundation for a hostile witness. You are not laying a

(Testimony of Circiaco Lezamiz.)

proper foundation as far as a hostile witness is concerned.

Q. (By Mr. Hawley): Is there any difference, in your opinion, as to right and actual grass to graze sheep on?

A. Is there—is any difference between rights and the grass? Right don't make the ewes.

Q. And do you know, as a sheep man for the past twenty-four years, whether Taylor Grazing Rights have to have base lands or grass to attach to?

A. I don't follow you, Mr. Hawley, quite.

Q. Is that because you don't want to?

A. No. You go a little too high-class for me to answer.

Q. I will re-word the question.

A. All right.

Q. Grazing rights—Taylor Grazing Rights—

A U M's— A. Yes.

Q. —without grass or base land to attach to those rights, do they mean anything?

A. If the right mean anything?

Q. Without grass or base land?

A. Well, more or less the rights have grass—but never enough—never is too much. [103]

Q. Did you rent any grazing land from Mr. Sewell in the summer of 1956?

A. Yes, I did.

Q. Did you pay him for that? A. Yes.

The Clerk: Marked as Defendant's Exhibit No. 24 for identification.

(Testimony of Circiaco Lezamiz.)

(The document referred to was marked Defendant's Exhibit 24 for identification.)

Q. (By Mr. Hawley): Handing you what has been marked Defendant's Exhibit No. 24 for identification, is that, is that the payment to Sewell that you referred to? A. Yes, sir.

Q. Would you turn it over and see if is endorsed?

Mr. Langroise: It will speak for itself.

The Witness: Who endorsed, who, myself or somebody else—on the back, by him.

Q. (By Mr. Hawley): No, I asked you if it was endorsed. Is your answer "yes or no"?

A. Yes, it is.

Q. Now, in connection with the grass land that you rented from Sewell, can you state whether or not you ran Wickahoney Sheep on that grass? [104]

Mr. Langroise: We object, if your Honor please, it is immaterial, irrelevant, and incompetent, as far as the issues are concerned.

The Court: I think it is, too.

The Witness: If there was Wickahoney Sheep Company in this grass?

Q. (By Mr. Hawley): That is what I asked you. A. Yes, there was.

Q. Do you know how many head of sheep you ran on the grass, and for what period of time?

A. The check shows the sheep was—

Q. I am just asking you if you know.

A. Yes. I think so.

(Testimony of Circiaco Lezamiz.)

Q. Well, will you answer it?

A. Like the check says, there was fifty-two hundred and twenty days feed, is what I paid. I was paying so much for the days.

Q. Fifty-two hundred, or fifty-two thousand?

A. Excuse me, fifty-two thousand two hundred twenty-five days.

Q. How many sheep?

A. I don't remember now how many sheep. There was—there was a price of a cent and a half a day.

Q. And by arithmetic, you could get the number of [105] sheep out of that; for what period of time?

A. Oh, I think part of it in June and July.

Q. 1956? A. Right.

Mr. Hawley: Thank you. You may inquire.

Cross-Examination

By Mr. Langroise:

Q. Mr. Lezamiz, handing you what is marked Defendant's Exhibit 23, that paper there——

A. Yes.

Q. ——do you know who wrote it, who drew it up? A. I think so.

Q. Who? A. Mr. Lloyd Haight.

Mr. Langroise: Without waiving our right as to the materiality, we would like to inquire as to some other things.

Q. (By Mr. Langroise): In Defendant's Ex-

(Testimony of Circiaco Lezamiz.)

hibit No. 23, the mention is made of a Mr. Harley McDowell. Certain determinations to be made.

A. You says that there was made out with Harley McDowell?

Q. No. In the Agreement, they mention in the wording something about Harley McDowell.

A. Oh, we put Harley McDowell——

Mr. Hawley: Is that a question or a statement?
I [106] will object unless it is a question.

The Court: If the Exhibit states that, he can state whether it is a fact.

Mr. Hawley: I will object on the ground that the Exhibit speaks for itself.

Q. (By Mr. Langroise): Who was Harley McDowell?

A. He was the guy that priced the eight hundred A U M's from Sewell to Wickahoney Sheep Company.

Q. And is the one referred to in the agreement?

A. Right.

Q. And did you subsequently see, on November 23, 1955, the report of Harley McDowell?

A. Yes.

Mr. Langroise: That may be marked?

The Clerk: Marked Plaintiff's Exhibit No. 25 for identification.

(The document referred to was marked Plaintiff's Exhibit No. 25 for identification.)

Q. (By Mr. Langroise): Handing you Plaintiff's Exhibit No. 25 marked for the purposes of

(Testimony of Circiaco Lezamiz.)

identification, I will ask you whether or not that is the report from Mr. McDowell that the Wickahoney Sheep Company received, and Mr. Sewell, with respect to Defendant's Exhibit 23?

A. Yes, sir. [107]

Mr. Langroise: We offer in evidence Plaintiff's Exhibit No. 25.

Mr. Hawley: We have no objection to the admission of the Exhibit.

The Court: Exhibit 25 may be admitted.

(The document referred to was marked Plaintiff's Exhibit No. 25 and was received in evidence.)

The Clerk: Marked as Plaintiff's Exhibit No. 26 for identification.

(The document referred to was marked Plaintiff's Exhibit No. 26 for identification.)

Q. (By Mr. Langroise): Handing you what has been marked Plaintiff's Exhibit No. 26 for identification, I will ask you if you know what that is?

A. I think I know what this is.

Mr. Langroise: We offer in evidence Plaintiff's Exhibit No. 26.

Mr. Hawley: I don't believe he identified what it is.

The Court: He said he believed he knew.

Q. (By Mr. Langroise): Mr. Lezamiz, tell us what it is, if you know.

(Testimony of Circiaco Lezamiz.)

A. Well, it says pretty plain, the Transfer Rights in the grazing from Mr. Sewell's Rights to Wickahoney Sheep [108] Company.

Q. Mr. who?

A. From Charlie Sewell, or Mr. Sewell, or whatever you call him.

Mr. Langroise: We now offer it.

Mr. Hawley: I have no objection.

The Court: It may be admitted.

(The document referred to was marked Plaintiff's Exhibit No. 26 and was received in evidence.)

Q. (By Mr. Langroise): You were asked about Nit Creek Ranch? A. Yes, sir, Nit Creek.

Q. That was not a part of the Coig property, was it? A. No, never was.

Q. No. That was another operation of Mr. Sewell's? A. Right.

Q. Mr. Lezamiz—— A. Right.

Q. ——did you ever say anything to Mr. Sewell, the Plaintiff, or his wife, or to Mr. Wilson, that the sheep bought by Wickahoney under the contract, or being bought under the contract by Wickahoney from Mr. Sewell, were not as you understood them to be?

Mr. Hawley: I object on the grounds it is argumentative, as he assumes them to be, is an argumentative question. [109]

The Court: He may answer "yes or no."

(Testimony of Circiaco Lezamiz.)

The Witness: Well, I answer the question. You repeat the question for me, please, Mr. Langroise?

Q. (By Mr. Langroise): Mr. Lezamiz, the sheep that were purchased by Wickahoney under the contract, the agreement to purchase from Mr. Sewell, and delivered to Wickahoney Sheep Company on October 18, 1955—

A. October 15, if I remember right, 1955, yes.

Q. And you think October 15?

A. I imagine, I don't know sure—between the 15th and 18th.

Q. Between the 15th and 18th of October, 1955?

A. Right.

Q. And I believe prior to the time you took a delivery of all of the property, you had looked at all of the property and the sheep? A. Yes.

Q. And looked at the camps? A. Yes.

Q. And you had the sheep, or Wickahoney had the sheep in its possession from somewhere between October 15, 1955, continuously thereafter until December 15, 1955; you understand me?

A. If we have the sheep until December? [110]

Q. Well, you signed the contract, the Purchase Agreement on December 15? A. Right.

Q. And from the time in October, the 15th or 18th, to December 15th, when you signed the Agreement, the sheep were all in the possession of the Wickahoney Company? A. Yes, sir.

Q. And were being run by the Wickahoney Sheep Company? A. Yes, sir.

Q. And were the sheep as you saw them before

(Testimony of Circiaco Lezamiz.)

they were delivered to you, and after, were they the sheep that you understood you were purchasing?

A. Purchasing, what is that?

Q. Agreeing to buy by the Wickahoney Company from Mr. Sewell. A. Yes.

Q. Those that you had agreed to buy?

A. Yes.

Q. And did you ever, at any time, and up to and including the present time, ever say anything to Mr. Sewell, his wife, or Mr. Wilson, that the sheep that Wickahoney got from Mr. Sewell were not the sheep that you purchased and just as you had inspected them?

Mr. Hawley: I will object on the grounds that it is [111] argumentative and assumes facts not in evidence; what did he inspect?

The Court: That is true. I don't believe the man has testified that he didn't get the sheep that he bought.

Mr. Langroise: That is correct. I was following it through to tie it in.

The Court: The objection will be sustained.

Q. (By Mr. Langroise): Mr. Lezamiz, during the year 1957, or the latter part of '56, was Wickahoney Sheep Company occupying what is known as the Nit Creek Ranch? A. Yes, sir.

Q. And during that period, were they, the Wickahoney Sheep Company, using the eight hundred A U M's which were transferred or acquired by the Wickahoney Sheep Company and represented by

(Testimony of Circiaco Lezamiz.)

Plaintiff's Exhibit No. 26? Perhaps you don't understand.

A. You says from the Wickahoney Sheep Company?

Q. I believe you said you got eight hundred A U M's from Mr. Sewell in addition to what you bought originally.

A. That's right.

Q. And did Wickahoney Sheep Company use those eight hundred A U M's?

A. That's right. [112]

Q. And continued to use them, and were using them until the time the Receiver took possession of the Wickahoney Sheep Company?

A. Yes, sir.

Q. Did Wickahoney Sheep Company ever pay to Charles Sewell, or his wife, or Mr. Wilson, any of the Plaintiffs, anything for the eight hundred A U M's?

A. Not that I know.

Q. Did you, Mr. Lezamiz, or Wickahoney Sheep Company ever complain to Mr. Sewell, or his wife, or Mr. Wilson, about the age of the sheep at any time?

A. No.

Mr. Langroise: If your Honor please, I believe that is all of the cross-examination we have.

The Court: Any redirect examination, Mr. Hawley?

Mr. Langroise: May I ask one more question?

The Court: Yes, you may.

Q. (By Mr. Langroise): Mr. Lezamiz, did you receive any instructions to sell any of the sheep that you were buying, or Wickahoney was buying from Mr. Sewell?

A. Yes.

(Testimony of Circiaco Lezamiz.)

Mr. Hawley: To which I object, and move the answer be stricken as not being the best evidence.

Mr. Langroise: Anything in evidence would be in [113] writing.

Q. (By Mr. Langroise): From whom did you receive the instructions?

Mr. Hawley: And I further object as not within the issues of the case. The facts are before the Court. The sales were made, and to whom, and they are relevant.

The Court: Being a Court trial, I will determine that.

The Witness: If anybody told me?

Q. (By Mr. Langroise): Yes, to sell the ewes.

A. Yes, sir.

Q. Who was that? A. Mr. Simplot.

Q. And when did he give you the instructions?

Mr. Hawley: I will make the same objection; it's irrelevant.

The Court: Same ruling.

The Witness: May I answer?

Mr. Langroise: Yes.

The Witness: Really, I don't know the date—sometimes in 1957—around July—sometimes in July.

Q. (By Mr. Langroise): Of what year; you said 1957? A. '56, I should say. [114]

Q. Are you sure it was 1956? A. Yes, sir.

Q. And was that prior to the time that the payment on October 10, 1956, was to be made to Sewell under the contract?

(Testimony of Circiaco Lezamiz.)

A. I still—I give you the correct answer, 1956 or 1957, excuse me a minute.

Q. Yes.

A. That was in 1957, and also in '56.

Q. And in '56? A. Also.

Q. And about when was it in 1956?

A. When?

Q. About what time of the year? A. Yes.

Q. If you can fix it.

Mr. Hawley: I will make the same objection, that it is immaterial.

The Witness: May I answer?

Mr. Langroise: Yes.

The Witness: About the month of July.

Q. (By Mr. Langroise): Of 1956?

A. Correct.

Q. Were you advised as to whether or not the payment [115] due on October 10, 1956, would be paid? A. If I know?

Q. Yes.

A. Yes, I know that it had to be paid.

Q. And did you know whether it was going to be paid by the Wickahoney Sheep Company?

A. It had to be paid from the Wickahoney Sheep Company.

Q. Did you know whether Wickahoney was going to pay? A. Yes, I know they don't pay.

Q. That they would not pay? A. Right.

Q. How did you know that?

A. Because——

(Testimony of Circiaco Lezamiz.)

Mr. Hawley: I will make the same objection.

The Court: Objection sustained.

Q. (By Mr. Langroise): When was it determined that Wickahoney Sheep Company would not make the payment due on October 10, 1956, under the terms of the contract?

Mr. Hawley: I will object to the question on the grounds of immateriality and irrelevancy, and the fact is in evidence that the payment was not made.

The Court: The objection will be [116] sustained.

Mr. Langroise: If your Honor please, that is all at this time.

The Court: Do you have any redirect, Mr. Hawley?

Mr. Hawley: Yes, your Honor.

Redirect Examination

By Mr. Hawley:

Q. You testified in answer to Mr. Langroise that you used the eight hundred A U M's that Sewell transferred to you, is that right?

A. Eight hundred A U M's?

Q. Let's listen to the question. You testified to Mr. Langroise that Wickahoney used the eight hundred A U M's that were transferred by Sewell to Wickahoney under Exhibit No. 26, didn't you?

A. That's right.

Q. And looked at the description of the land on

(Testimony of Circiaco Lezamiz.)

the back of that Exhibit; what lands are those, if you know?

A. Really, I can give you an answer which lands is these—I don't follow the numbers and the initial.

Q. Doesn't the Exhibit state that the Rights are appertinent, or attached, or used in connection with the land described on the back of it?

A. Mr. Hawley, I don't follow you.

Mr. Langroise: It speaks for itself.

The Court: Yes. [117]

Q. (By Mr. Hawley): You don't know what the lands are?

A. No. I can't understand like the sixteen south and the section like I should.

Q. Do you know whether that is the land involved in the Exhibit 17?

Mr. Langroise: The witness said he didn't know.

The Witness: Really, I can't answer you. The A.U.M.'s, Mr. Hawley.

Q. With respect to the Nit Creek Range of Mr. Sewell, that Mr. Langroise asked you about, and referring to the check, No. 214, can you state whether or not that was given to Mr. Sewell, it is Exhibit 24, can you state whether or not that was given to Mr. Sewell in connection with grazing the ewes on the Nit Creek Property?

A. No, sir. No.

Mr. Langroise: Mr. Hawley, have you offered Exhibit 24?

Mr. Hawley: No, but I will offer it at this time.

(Testimony of Circiaco Lezamiz.)

The Court: It may be admitted, for what it is worth.

(The document referred to was marked Defendant's Exhibit No. 24 and was received in evidence.) [118]

Q. (By Mr. Hawley): Did you ever run any of your sheep, or Wickahoney Sheep, on the Nit Creek Range?

A. Yes. Every fall and spring since we had it.

Q. Did you ever run any in the summer on the Nit Creek Range?

A. Well, I make a deal with my neighbor and let him use the Nit Creek and he let me use the high country. That is the only way—I make a deal with my neighbor.

Q. Did Sewell ever lease or transfer the Nit Creek Property to the Wickahoney Sheep Company?

A. As I understand the transfer from Mr. Sewell to Wickahoney was a long time ago.

Q. I didn't hear you.

A. He transferred the right to Nit Creek a long time.

Q. You are talking about the rights. Did he ever lease the land to Wickahoney?

A. Any land, you mean?

Q. The Nit Creek land?

A. Well, I think the lease is the option to buy. We have all of the right of Nit Creek to use it.

Q. What did you mean by "right"?

(Testimony of Circiaco Lezamiz.)

A. We don't have to lease it cause we got it.

Q. What do you mean by "right" so that I understand?

A. Well, he transferred all of the rights from Nit Creek to Wickahoney Sheep Company, and Nit Creek.

Q. By "right" do you mean the grazing right?

A. Yes.

Q. Now, I will ask you the question. Did Sewell ever lease the Nit Creek land to Wickahoney?

A. Yes. Yes, he did, yes.

Q. And was that a written lease?

A. An oral lease, you mean?

Q. A written lease? A. Writed down?

Q. When you have a written lease, you have to put it on paper.

A. No. Not the oral lease. I showed you it. We put as an enter place in the Nit Creek Right, and we got it. That is what you want to know, Mr. Hawley?

Q. Well, that is the answer I got.

A. I don't know what you want. Anyhow——

Q. Did you state to me, there was a written lease, or was not a written lease of the Nit Creek Land?

The Court: Could you clarify it, Mr. Hawley? Mr. Lezamiz, he wants to know if the lease was of the deeded land.

The Witness: Oh.

Q. (By Mr. Hawley): I am talking about the land. Was there any lease of any deeded Nit Creek Land? [120] A. Deeded, yes.

(Testimony of Circiaco Lezamiz.)

Q. The Nit Creek?

A. That is deeded land?

Q. Was there a lease to the deeded land on Nit Creek? A. Yes.

Mr. Hawley: That is all I was trying to get at.

The Witness: I hope I understand you right, what you want.

Recross-Examination

By Mr. Langroise:

Q. Mr. Lezamiz, who prepared the papers for Wickahoney? A. What is paper?

Q. Any paper for the leases and the agreement.

A. Well, Mr. Lloyd Haight and McDonald.

Mr. Langroise: I think that is all.

Mr. Hawley: I have no further question.

The Court: That is all sir.

(The witness left the stand.)

The Court: We will adjourn until tomorrow morning at 10:00 o'clock.

(Whereupon, the Court adjourned at 4:40 p.m.) [121]

April 11, 1958—10:00 O'Clock A.M.

The Court: You may call your next witness, Mr. Hawley.

Mr. Hawley: Call Mr. Balderrama.

J. BALDERRAMA

a witness called on behalf of the defendant having been first duly sworn, was examined and testified as follows:

The Clerk: State your name for the record, please.

The Witness: J. Balderrama.

Direct Examination

By Mr. Hawley:

Q. Mr. Balderrama, where do you reside?

A. Boise.

Q. Please speak up. A. In Boise.

Q. Do you have an association with the Wickahoney Sheep Company? A. I do.

Q. What capacity? A. Bookkeeper.

Q. And do you have possession of the books and records of Wickahoney Sheep Company, and are you familiar with them? A. I am. [122]

Q. And did you make all of the entries yourself in the regular course of business? A. Yes.

Q. At my request, you have with you the Journal and the General Ledger? A. I do.

Q. And do those books contain a complete and accurate record of all of the receipts and the disbursements in connection with the operation of the Wickahoney Sheep Company, one of the defendant's in this lawsuit? A. Yes.

Q. And at my request, did you make a summary of cash receipts—gross income—from the operation?

A. Yes, sir.

(Testimony of J. Balderrama.)

Q. Did you take that from the books and records which you have in front of you? A. Yes.

Q. And those are the original records?

A. Yes.

Q. In addition, did you prepare an Operating Statement of the Company for the period October 18, 1955, to September 30, 1956? A. Yes.

Q. And did you prepare a Statement of Income and Expenses, an Operating Statement for the period commencing [123] October 1, 1956, and ending October 8, 1957? A. Yes.

Q. And that summary was taken from the books you have in front of you? A. Yes.

Q. Do you have that summary? A. Yes.

Mr. Hawley: May that be marked?

The Clerk: Marked as Defendant's Exhibit No. 27 for identification.

(The document referred to was marked Defendant's Exhibit No. 27 for identification.)

Mr. Hawley: If you will hand that to Mr. Langroise, please.

(Document in question handed to Mr. Langroise.)

Mr. Hawley: We offer Defendant's Exhibit No. 27.

Mr. Langroise: If your Honor please, we object that it is irrelevant, immaterial, and incompetent, as far as the issues here are concerned.

The Court: I do not see the materiality at the

moment, but I am going to admit it for what it is worth.

(The document referred to was marked Defendant's Exhibit No. 27 and was received in evidence.)

Mr. Hawley: You may inquire. [124]

Mr. Langroise: We have no cross-examination.

Mr. Hawley: You may step down.

The Court: That is all, sir.

(The witness left the stand.)

The Court: Call your next witness.

Mr. Hawley: Call Mr. Haight.

LLOYD E. HAIGHT

a witness called on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name for the record, please.

The Witness: Lloyd E. Haight.

Direct Examination

By Mr. Hawley:

Q. Your name is Lloyd Haight?

A. Yes, sir.

Q. Where do you reside, Mr. Haight?

A. Boise, Idaho.

Q. And do you have any official capacity with the Defendant, Wickahoney Sheep Company?

(Testimony of Lloyd E. Haight.)

A. I am Vice President and legal advisor to the company.

Mr. Langroise: Move that the answer be stricken. The best evidence is with the defendant company and would be established by the books and the records of the company.

The Court: You mean as to the capacity of [125] Vice President?

Mr. Langroise: Yes, sir.

Mr. Hawley: I will withdraw the question.

Q. (By Mr. Hawley): Are you the attorney for the Wickahoney Sheep Company?

A. I am, yes, sir.

Q. That is satisfactory. In connection with your functions as attorney for Wickahoney Sheep Company, did you cause to be prepared Defendant's Exhibit No. 23, and did you draft the document?

A. I did, yes.

Q. Now, in connection with Defendant's Exhibit No. 23, did you take any further proceedings in aid of this memorandum agreement?

A. Yes, I did.

Q. I will ask you whether or not, to your knowledge, the parties, Sewell and Wickahoney, engaged the services of one Harley McDowell?

A. They did, yes.

Q. And did the company receive anything from Mr. McDowell pursuant to the services that he rendered for the company and Sewell?

A. The company did receive a report, yes.

Q. And that, Mr. Haight, is the report that

(Testimony of Lloyd E. Haight.)

has been [126] admitted in evidence in this proceeding, to your knowledge? A. Yes, sir.

Q. Handing you what has been marked as Exhibit No. 25, and admitted in evidence, is that the report to which you had reference?

A. It is, yes, sir.

The Clerk: Marked as Defendant's Exhibit No. 28 and 29 for identification.

(The documents referred to were marked Defendant's Exhibits No. 28 and No. 29 for identification.)

Q. (By Mr. Hawley): After receiving Exhibit No. 25 from the Wickahoney Sheep Company, which is Mr. McDowell's reports, did you then cause to be prepared any document?

A. Yes, sir. I prepared a lease and an option to purchase.

Q. Handing you first Defendant's Exhibit 28, would you state, generally, what that document purports to be?

A. A copy of the lease I prepared.

Q. And referring to Exhibit No. 29, would you state what the document is?

A. That is a copy of the offer to purchase which I prepared.

Q. Now, the report covers the Nit Creek property. I will ask you if the legal description of the property [127] contained in Exhibit 28 and 29 are the same property referred to in Mr. McDowell's report?

(Testimony of Lloyd E. Haight.)

Mr. Langroise: We object to all of this, if your Honor please, as this being immaterial, and irrelevant, and is a separate transaction occurring in October, 1955, and is not tied in to the Purchase Contract entered into by the Sewells.

The Court: It may be. I am going to admit it conditionally. This is a Court Trial, and I will determine it at a later date.

The Witness: It is a description of the Nit Creek property.

Q. (By Mr. Hawley): What did you do with those documents?

A. I transmitted them to Mr. Wilson, Attorney at Law, at Elko, Nevada.

Q. What date?

Mr. Langroise: May the objection go to all of this, your Honor?

The Court: Yes, it may.

The Witness: The latter part of September, I believe, 1956.

Q. (By Mr. Hawley): And how were the documents sent?

A. By regular mail, postage pre-paid. [128]

Q. And what address?

A. I don't recall Mr. Wilson's address. He is in a Bank Building.

Q. What town? A. Elko, Nevada.

Q. Now, did you ever receive a communication from Mr. Wilson in connection with the receipt of the documents you testified you mailed to him?

A. I did. Yes, sir.

(Testimony of Lloyd E. Haight.)

The Clerk: Marked as Defendant's Exhibit No. 30 for identification.

(The document referred to was marked Defendant's Exhibit No. 30 for identification.)

Q. (By Mr. Hawley): With reference to Exhibit 30, can you state, generally, what the document is, or purports to be?

Mr. Langroise: If it is the purpose of identification, or is it for contents?

The Court: He may answer. Tell generally what it is.

The Witness: It is a letter addressed to me from Orville Wilson, dated October 5, 1956, wherein he acknowledged receipt of the Nit Creek document.

Mr. Hawley: That is satisfactory. We offer Defendant's Exhibit No. 30. [129]

Mr. Langroise: We object, if your Honor please, on the grounds it is irrelevant and immaterial so far as the issues here are concerned.

The Court: It may be admitted for what it is worth.

(The document referred to was marked Defendant's Exhibit No. 30 and was received in evidence.)

Mr. Hawley: We feel it is material, your Honor, in connection with the affirmative defense.

Q. (By Mr. Hawley): Now, I will ask you, Mr. Haight, if in fact, the Agreement that you have referred to, Exhibits 28 and 29, were ever executed by Mr. Sewell and returned to you?

(Testimony of Lloyd E. Haight.)

Mr. Langroise: Our objection runs to all of this.

The Witness: They were never executed or returned to us.

Q. (By Mr. Hawley): Was a counter-proposal ever made by them? A. No, sir.

Q. Handing you what has been admitted in evidence as Defendant's Exhibit 22, which is an Assignment from Wickahoney Sheep Company to the Ruby Company of the lease, I believe it is Exhibit 17, did you cause that instrument to be prepared? A. Yes, sir. I did.

Q. Can you state whether or not there is a lease—a [130] sub-lease—back from Ruby Company to the Wickahoney Sheep Company?

Mr. Langroise: If there is a sub-lease, it would be the best evidence.

The Court: He may answer "yes or not."

The Witness: There was never a written sub-lease.

Q. (By Mr. Hawley): Was there an oral agreement?

A. Wickahoney Sheep Company was to use the property under a permissive use agreement, and compensate the Ruby Company for the base rental and the taxes involved.

Mr. Hawley: You may inquire.

(Testimony of Lloyd E. Haight.)

Cross-Examination

By Mr. Langroise:

Q. Mr. Haight, Mr. Orville Wilson, to whom you have referred, is an attorney at Elko?

A. Yes, sir.

Q. And he also represented the J. R. Simplot Company down there, did he not?

A. Yes, sir.

Mr. Langroise: That is all.

Mr. Hawley: You may step down.

(The witness left the stand.)

Mr. Elam: If your Honor please, there are a few matters: It is stipulated that the Notice given to the [131] bank for forfeiture was the one sent to them by registered mail as testified to yesterday.

Mr. Langroise: The Notice of Default was sent January 15th, and received January 16th.

Mr. Elam: And there were two copies sent to the bank; and there was no request made of the bank to forward the same to Wickahoney Sheep Company by registered mail.

Mr. Langroise: There is no question, and it is so stipulated.

Mr. Hawley: One of the Notices of Default was received on October 16th, and the other on the 17th.

Mr. Langroise: The one to Wickahoney was on the 17th.

Mr. Elam: And to report on the matter requested yesterday, as to the draft from John Clay

for \$22,357.13; that had a notation on the corner of the draft as follows: "One thousand eighty-six lambs." The draft to Commercial Credit Corporation for eleven thousand seven hundred four dollars eleven cents (\$11,704.11) had a notation "Shorn wool at Portland." The draft for two thousand eight hundred sixty-six dollars fifty-one cents (\$2,866.51) to Commodity Credit had the notation "Unshorn lambs." None of the other drafts had any notation whatsoever. This was checked on the micro-film.

The Court: As I understand, these were drafts received [132] by the bank with the notations thereon?

Mr. Langroise: That is correct.

Mr. Elam: Turned over to the bank by the treasurer of Wickahoney Sheep Company.

The Court: With the notations on them. Call your next witness.

Mr. Hawley: Call Harley McDowell.

HARLEY McDOWELL,
a witness called on behalf of the Defendant, having been first duly sworn was examined and testified as follows:

The Clerk: State your name for the record, please.

The Witness: Harley M. McDowell.

Direct Examination

By Mr. Hawley:

Q. Your name is Harley McDowell?

A. Yes.

(Testimony of Harley McDowell.)

Q. Where do you reside, Mr. McDowell?

A. Boise.

Q. And what is your occupation?

A. Range consultant and appraiser in the land management business.

Q. Are you self-employed? A. I am.

Q. And how long have you been in that business, just your own business? [133]

A. I have had my own business for the past seven years.

Q. And what kind of a business is that?

A. I make appraisals of all types of property; I do work on grazing consulting, and grazing operations; consulting on land management, ranching practices, and map making, and work with the United States Forest Service and the United States Department of the Interior and Taylor Grazing.

Q. Prior to going into your own business, what was your background?

A. I have a Bachelor's Degree from the Colorado State University in Range Managing and Land Economics, and have worked on a Master from Utah State University in the same field. I have ten years' experience with the United States Department of the Interior on Range Management and Land Classification, and four years as Director of Evaluation in charge of all appraisals for the State of Idaho.

Q. Could you state whether you are generally familiar with the nature of the Taylor Grazing Rights? A. I am.

(Testimony of Harley McDowell.)

Q. Could you tell us whether you are generally familiar with the carrying capacity of the range lands? A. I am.

Q. Are you familiar with the Grand View-Bruneau Area [134] for sheep and cattle operation?

A. Yes, sir.

Q. Are you familiar with what has been known in this lawsuit as the Coig spread?

A. Yes, sir.

Q. And for how long have you been familiar with that outfit? A. For 19 years.

Q. What has been the extent of your familiarity?

A. My first contact was in the capacity of making a range survey and a property study in compliance with the Taylor Grazing Regulations. Since that time I have been on the property many times checking the grazing capacity and working on the range management problems in the area.

Q. You are the Harley McDowell who has filed a report with Sewell and Wickahoney in this present situation, are you not? A. I am.

Q. Now, will you state whether or not you assisted the parties in this litigation in transferring any A U M's of the Taylor Grazing?

A. I did.

Q. And would you state, generally, what those eight hundred A U M's were, where they came from, if you know, and to what they were transferred? [135]

(Testimony of Harley McDowell.)

Mr. Langroise: Objection, if your Honor please, as being irrelevant, immaterial, and incompetent, and not within the issues here; and I want the objection to run to all of this line of questioning.

Mr. Hawley: It is material to the matter of the affirmative defense and the cross-complaint.

The Court: I cannot see how it is, but I am going to reserve the ruling until a later date.

Mr. Hawley: Very well.

The Witness: The eight hundred A U M's were taken from the property owned by C. A. Sewell, and transferred to the Wickahoney property or formerly in the Coig set up.

Q. (By Mr. Hawley): Can you state whether or not the parties designated you to set aside any of the Sewell's deeded land to be transferred to the Wickahoney Sheep Company? A. They did.

Q. And what lands were those?

A. Locally known as the Nit Creek property, comprising three hundred sixty acres.

Q. Are you familiar with it? A. Yes.

Q. And have you been over it? A. Yes.

Q. Frequently? [136]

A. I have been on it many times in the last 19 years.

Q. Do you know how many A U M's are required in that area to care for four bands, or four thousand head of ewes? A. I do.

Q. How many A U M's are required?

Mr. Langroise: In addition to the general ob-

(Testimony of Harley McDowell.)

jection, we object that there is no proper foundation laid as far as the issues here are concerned.

Mr. Hawley: Again, that is correlative of the misrepresentation, your Honor.

The Court: There is no misrepresentation so far. He may answer.

The Witness: Nine thousand six hundred.

Q. (By Mr. Hawley): Now, I will ask you this: Have you examined the description of the real estate, the grazing rights, and the State leases described in Exhibit 17, being the modified lease between the parties?

A. If Exhibit 17 is the modified lease, I have examined it.

Q. What property is that, do you know of your own knowledge?

A. That is the old Coig outfit, the State lease and deeded [137] of the Wickahoney Sheep Company.

Q. How many Animal Unit Months are contained in that described property, if you know?

Mr. Langroise: With the understanding of the same objection, your Honor.

The Court: Yes.

The Witness: May I refer to my notes?

Q. (By Mr. Hawley): Yes.

A. In making a summary of the base property, deeded and leased lands, and the Federal Range Privileges, the total carrying capacity would be five thousand eight hundred seventy-eight A U M's.

Q. And how many sheep on a year round lamb

(Testimony of Harley McDowell.)

operation would those five thousand some odd A U M's carry?

A. Approximately twenty-five hundred.

Q. Assuming four thousand odd head of ewes being operated on the Coig property as described, how much additional range would be required?

Mr. Langroise: To which we want the same objection.

The Court: Yes. Same ruling.

The Witness: You would need three thousand seven hundred twenty-two additional A U M's. [138]

Q. (By Mr. Hawley): Can you convert that into the number of head of sheep and the months that would be required for additional range?

A. I would like to explain the answer in this respect; it would work out to fifteen hundred head of sheep. That is not true in this outfit; there is adequate range for the spring and fall seasons, and it is short for the summer or the late spring when you are making the lambs, and you are short in the winter—you would have to buy hay and grain—those are when you are short, and it would not be the straight fifteen hundred, you would be short—some seasons it would be adequate.

Q. In your opinion, you would be short on four thousand for a carrying capacity of four thousand ewes, you would be short a summer season and a portion of a winter season?

A. That is correct.

Q. And how many months, or what period of time in the summer?

(Testimony of Harley McDowell.)

A. You would be short approximately two thousand head of sheep in two months in the summer, and in the winter you would lack enough hay if all of the property were in top production for all of the four thousand for as much as two months. [139]

Mr. Hawley: You may inquire.

Mr. Langroise: Your Honor, without waiving the objection, we want to ask one or two questions.

The Court: Very well.

Cross-Examination

By Mr. Langroise:

Q. Mr. McDowell, with respect to the agreement, you are familiar with Exhibit No. 25?

A. I am.

Q. And now, with respect to Plaintiff's Exhibit No. 25, that is the report of what you did with respect to that agreement?

A. That's right.

Q. Now, pursuant to that, did you go ahead with the assistance of Mr. Sewell and accomplish a transfer of eight hundred A U M's from the land of Mr. Sewell, other than the Coig property?

A. Yes, sir.

Q. And that is Exhibit No. 26?

A. Yes, sir.

Q. And that transfer of the eight hundred A U M's was from the land of Mr. Sewell, other than the Coig property, is that correct?

A. That is correct.

(Testimony of Harley McDowell.)

Q. And in the transfer it was transferred to attach [140] to the Coig property, is that correct?

A. That is correct.

Mr. Langroise: That is all.

Redirect Examination

By Mr. Hawley:

Q. Did the shortage that you have referred to in your previous testimony apply to the years of 1956—'55, '56 and '57? A. Yes, sir.

Mr. Hawley: Thank you, that is all.

Mr. Langroise: Nothing further.

The Court: That is all, Mr. McDowell.

(The witness left the stand.)

Mr. Hawley: We rest, your Honor.

The Court: Any rebuttal?

Mr. Langroise: One moment, if your Honor please. We will want to make a motion, and then we will see about a rebuttal.

Mr. Sullivan: May it please the Court, the Plaintiffs move for a dismissal of the counter-claim of the Defendant's on the ground and for the reasons there is no evidence nor any basis in law or in fact to support the allegations or to entitle the defendants to a judgment on the counter-claim.

The counter-claim is based entirely upon purported false [141] misrepresentations made by the Plaintiffs Sewell to the Defendant Wickahoney

Sheep Company; (1) that in connection with the age of the sheep; (2) that there were more lands and grazing rights in the lease which was subsequently assigned to the Ruby Company as represented by the Plaintiff Sewell. There is no evidence whatsoever that the Plaintiff Sewell made any representation of any kind concerning the age of the sheep with which the President and General Manager of Wickahoney Sheep Company was not familiar. He testified that he had examined the camps, and had, on numerous occasions, examined the sheep, and that actually Wickahoney Sheep Company had possession of the bands of sheep for a period of approximately two months before the Purchase Agreement was ever entered into. It shows that there was never any claim asserted or statement made by Defendant Wickahoney Sheep Company to Sewell, or Orville Wilson, or any of the Plaintiffs, claiming that there was any misrepresentation made by them or in fact as to the quality of the sheep until the counter-claim was filed in the action. During the period of time they held the sheep from October 15, 1955, until they were turned over to the Receiver on October 9, 1957, and held them and treated them and used them as their own; made sales of lambs, ewes, and wool, without any claim during that whole time that there had been any misrepresentation as to the sheep. The same is also true of the question of the range [142] rights as asserted in the counter-claim. There was no representation proved, or any evidence offered as to any representation of the

range rights, or that the representation, if any, were not complete.

The President and General Manager of the Wickahoney Sheep Company testified that he got all that he expected to get, but he would like to have more. In addition, the evidence shows that the lease of the real property was assigned and transferred by the Wickahoney Sheep Company to the Ruby Company, which is still apparently the owner and the holder of that lease.

It was testified to by Mr. Haight that the Wickahoney Sheep Company had the permissive use of the property, and that does not give them a right to maintain any claim against these Plaintiffs on this counter-claim on the basis of a false misrepresentation, if any were made. As to the range rights and the real property involved, it is simply that the Wickahoney Sheep Company is no longer the real party in interest.

Mr. Hawley: If your Honor please, the cross-complaint is double-barreled; One, on the representation with respect to the sheep, and the second, in connection with the misrepresentation of the matter of the range rights. Now, there are a lot of Exhibits in the lawsuit filed up to this time and admitted, and one of the Exhibits we rely on is the [143] October 18, 1955, Agreement between the parties, which was prior to the execution of the principal contract, on December 15, 1955. In that Agreement, in recital, it says that the additional range rights are contemplated to be exchanged between the parties, and the additional

range lands are to be selected and leased and optioned to the Wickahoney Sheep Company.

There has been a partial performance by the transfer of eight hundred A U M's to the Wickahoney Sheep Company base land spread.

The Court: Assuming that that is true, does that give you a basis for an action for fraud and misrepresentation, or breach of contract?

Mr. Hawley: I think fraud and misrepresentation.

The Court: I am not going to rule on the motion at this time. I am going to reserve the ruling until I decide what I think is the main case. At this time, I will be frank to say, that I don't know of any evidence of the misrepresentation. I will look over all of the Exhibits and review the evidence. Because they agreed to do something and didn't do it, doesn't mean fraud and misrepresentation. Do you care to argue the case orally at this time?

Mr. Langroise: I am assuming it would be of little value to your Honor.

The Court: I would not go that far, Mr. Langroise. [144] You may waive oral argument and submit it on brief, if you care to.

Mr. Hawley: I would prefer to submit it on brief.

Mr. Langroise: That is agreeable.

The Court: The Court will take it under advisement.

Mr. Hawley: I would like to renew the motion,

at this time, to dismiss with the additional ground that the Plaintiff proof of damages are speculative.

The Court: Very well, same ruling. The ruling will be withheld pending the findings. We will adjourn subject to call.

(Whereupon the Court adjourned.)

County of Ada,
State of Idaho—ss.

I, Edward F. Seymour, hereby certify that I am an Official Reporter for the United States District Court for the District of Idaho;

I further certify that I took the proceedings in the above entitled cause in Stenotypy and thereafter the same were reduced to typewriting under my supervision, and I further certify that the foregoing is a true and correct transcript of the proceedings had in and about said hearing on the date mentioned therein.

In witness whereof I have hereunto set my hand this 27th day of January, 1959.

/s/ EDWARD F. SEYMOUR,
Official Reporter.

[Endorsed]: Filed January 27, 1959.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

United States of America,
District of Idaho—ss.

I, Ed. M. Bryan, Clerk of the United States District Court for the District of Idaho, do hereby certify that the foregoing papers are that portion of the original files designated by the parties and as are necessary to the appeal under Rule 75 (RCP):

1. Complaint.
2. Summons, with return thereon.
3. Motion to Dismiss and Motion for More Definite Statement.
4. Minutes of the court of June 11, 1957, denying motions.
5. Answer and counter claim.
6. Reply to counter claim.
7. Motion to deposit in court.
8. Minutes of the court of October 4, 1957, granting motion to deposit escrow in court.
9. Motion for leave to file supplemental complaint.
10. Motion for appointment of temporary receiver, etc.
11. Affidavit of Jess B. Hawley, Jr.
12. Order authorizing deposit in court.
13. Motion for appointment of receiver.
14. Minutes of the court of October 8, 1957,

granting appointment of receiver and filing of supplemental complaint.

15. Supplemental complaint.

16. Order appointing receiver.

17. Receipt for documents deposited in registry of court.

18. Bond of receiver.

19. Oath of receiver.

20. Interrogatories to Defendant Wickahoney Sheep Company.

21. Interrogatories to Defendant Bank of Idaho.

22. Inventory of receiver.

23. Stipulation for sale of property.

24. Order for sale of property.

25. Objections to interrogatories to Wickahoney Sheep Co.

26. Objections to inventory of receiver.

27. Objection to interrogatory to Bank of Idaho.

28. Answers to interrogatories by Bank of Idaho.

29. Answers to interrogatories by Wickahoney Sheep Co.

30. Motion of receiver for delivery of documents.

31. Notice of hearing.

32. Answer to supplemental complaint.

33. Motion of Wickahoney Sheep Co. to amend order appointing receiver.

34. Minutes of the court of November 29, 1957, denying motions to amend Order Appointing Receiver and denying Objections to inventory of receiver; granting motion for delivery of documents; taking Objections to Interrogatories under advisement.

35. Order for receiver to examine documents, etc.
36. Stipulation and order for sale of property.
37. Order re: objections of Defendants to interrogatories.
38. Answer of Wickahoney Sheep Co. to Plaintiffs' interrogatory No. 14.
39. Notice of taking deposition of Ciriaco Lezandiz.
40. Appearance of L. E. Haight as additional counsel for Defendants.
41. Motion for production, inspection and copying of documents.
42. Affidavit in support of motion for production, etc.
43. Notice of hearing on motion for production, etc.
44. Notice of taking deposition of J. R. Simplot.
45. Minutes of the court of April 3, 1958, ruling on motion for production.
46. Minutes of the court of April 9, 1958, pre-trial hearing.
47. Minutes of the court of April 10, 1958, record of trial.
48. Minutes of the court of April 11, 1958, record of trial.
49. Stipulation and order for sale of property.
50. Motion and order extending time for Defendant to file brief.
51. Stipulation and order extending time for Plaintiff to file reply brief.
52. Copy of statement of taxes due by Wickahoney Sheep Co.

53. First and final account of receiver.
54. Stipulation to allow receiver's account.
55. Order approving first and final account of receiver and discharging receiver.
56. Minutes of the court of October 31, 1958, announcing decision.
57. Objections to findings of fact and conclusions of law.
58. Minutes of the court of December 18, 1958, hearing on objections to findings of fact and conclusions of law.
59. Findings of fact and conclusions of law.
60. Judgment.
61. Receipt from W. H. Langroise for purchase agreement, bill of sale, chattel mortgages, and check.
62. Bill of costs.
63. Notice of taxation of costs.
64. Notice of appeal of Bank of Idaho.
65. Stipulation and order fixing supersedeas bond.
66. Supersedeas bond (Bank of Idaho).
67. Notice of appeal of Wickahoney Sheep Co.
68. Bond for costs on appeal.
69. Designation of contents of record on appeal.
70. Deposition of J. R. Simplot.
71. Reporter's transcript of proceedings.
72. Exhibits No. 1 to 30 inclusive.

In witness whereof I have hereunto set my hand and affixed the seal of said court, this 17th day of February, 1959.

[Seal] /s/ ED M. BRYAN,
Clerk.

[Endorsed]: No. 16390. United States Court of Appeals for the Ninth Circuit. Wickahoney Sheep Company, a corporation, Appellant, vs. C. A. Sewell, Orene H. Sewell and Orville R. Wilson, Appellees, and Bank of Idaho, Appellant, vs. C. A. Sewell, Orene Sewell and Orville R. Wilson, Appellees. Transcript of Record. Appeals from the United States District Court for the District of Idaho, Southern Division.

Filed: February 19, 1959.

Docketed: March 6, 1959.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 16390

WICKAHONEY SHEEP COMPANY, an
Idaho corporation,

Appellant,

and

BANK OF IDAHO (formerly Continental State
Bank), an Idaho corporation,

Appellant,

vs.

C. A. SEWELL, ORENE H. SEWELL and
ORVILLE R. WILSON,

Appellees.

MOTION FOR CONSOLIDATION
OF APPEALS

Come Now the parties hereto, by and through their respective attorneys of record, and respectfully move the Court that the separate appeals of Appellant Wickahoney Sheep Company and Appellant Bank of Idaho be consolidated, and that a single record only be required for said separate appeals, and further that said Appellants may jointly file one brief on appeal herein, covering their respective separate appeals, and that the Plaintiff be required to file but one reply brief in answer thereto.

This Motion is predicated upon the stipulation between the parties attached hereto and made a part hereof.

Dated this 20th day of February, 1959.

HAWLEY & HAWLEY,

By /s/ JESS B. HAWLEY, JR.,
Attorneys for Appellant
Wickahoney Sheep Co.

ELAM & BURKE,

HAWLEY & HAWLEY,

By /s/ JESS B. HAWLEY, JR.,
Attorneys for Appellant
Bank of Idaho.

W. H. LANGROISE,

W. E. SULLIVAN,

By /s/ W. E. SULLIVAN,
Attorneys for Appellees.

So Ordered:

/s/ WALTER L. POPE,

Chief Judge, U. S. Court of Appeals for the Ninth
Circuit.

[Title of Court of Appeals and Cause.]

STIPULATION

Come Now the parties hereto, by and through their respective attorneys of record, and stipulate as follows:

Whereas the Appellants above named have appealed separately from that certain final judg-

ment made and entered in this action against each of said Appellants on the 18th day of December, 1958; and

Whereas the parties hereto deem it to be in their best interests to consolidate said separate appeals;

Now, Therefore, It Is Stipulated that said separate appeals of Appellant Wickahoney Sheep Company and Appellant Bank of Idaho be consolidated, and a single record only be required on said appeal, and further that said Appellants may jointly file one brief on appeal herein, covering their respective separate appeals, the Appellees being required to file but one reply brief in answer thereto.

Dated this 20th day of February, 1959.

HAWLEY & HAWLEY,

By /s/ JESS B. HAWLEY, JR.,
Attorneys for Appellant
Wickahoney Sheep Co.

ELAM & BURKE,

HAWLEY & HAWLEY,

By /s/ JESS B. HAWLEY, JR.,
Attorneys for Appellant
Bank of Idaho.

W. H. LANGROISE,

W. E. SULLIVAN,

By /s/ W. E. SULLIVAN,
Attorneys for Appellees.

[Endorsed]: Filed March 3, 1959.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS UPON WHICH
APPELLANTS INTEND TO RELY

Come Now Appellants, Wickahoney Sheep Company and Bank of Idaho, and pursuant to Rule 17(6) of the rules of the above-entitled court do hereby designate and set forth the points upon which they intend to rely on appeal, as follows:

I.

That the court erred in making and entering its final judgment in favor of the Plaintiffs and against each of the Defendants, on December 18, 1958, for the reason that said judgment is contrary to law.

II.

That the court erred in overruling the objections of the Defendants to the proposed findings of fact and conclusions of law, and in refusing to adopt the affirmative findings requested by said Defendants.

III.

That the court erred in making and entering its findings of fact and conclusions of law for the reason that the same were not supported by the evidence, and were contrary to law.

Dated this 4th day of March, 1959.

HAWLEY & HAWLEY,

By /s/ JESS B. HAWLEY, JR.,

Attorneys for Appellant
Wickahoney Sheep Co.

ELAM AND BURKE,
HAWLEY & HAWLEY,

By /s/ JESS B. HAWLEY, JR.,
Attorneys for Appellant
Bank of Idaho.

Affidavit of mail attached.

[Endorsed]: Filed March 6, 1959.

[Title of Court of Appeals and Cause.]

STIPULATION

Come Now the respective parties hereto, by and through their attorneys of record, and stipulate that the exhibits in Case No. 3339 in the District Court of the United States for the District of Idaho, Southern Division, need not be printed as part of the record on appeal. The parties stipulate that it is in their best interests that said exhibits need not be printed, but that they be considered and referred to by the Court and counsel as though actually printed and incorporated in the record on appeal.

Dated this 4th day of March, 1959.

ELAM & BURKE,
HAWLEY & HAWLEY,

By /s/ JESS B. HAWLEY, JR.,
Attorneys for Appellant
Bank of Idaho.

HAWLEY & HAWLEY,

By /s/ JESS B. HAWLEY, JR.,

Attorneys for Appellant
Wickahoney Sheep Co.

W. H. LANGROISE,

W. E. SULLIVAN,

By /s/ W. E. SULLIVAN,

Attorneys for Appellees.

[Endorsed]: Filed March 6, 1959.

IN THE
United States
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For the Ninth Circuit

WICKAHONEY SHEEP COMPANY,
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Appellant,

and

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Appellant,

vs.

C. A. SEWELL, ORENE H. SEWELL
and ORVILLE R. WILSON,

Appellees

*Appeals from the United States District Court
for the District of Idaho.*

Opening Brief for Appellants

HAWLEY & HAWLEY

Eastman Building
Boise, Idaho

ELAM & BURKE

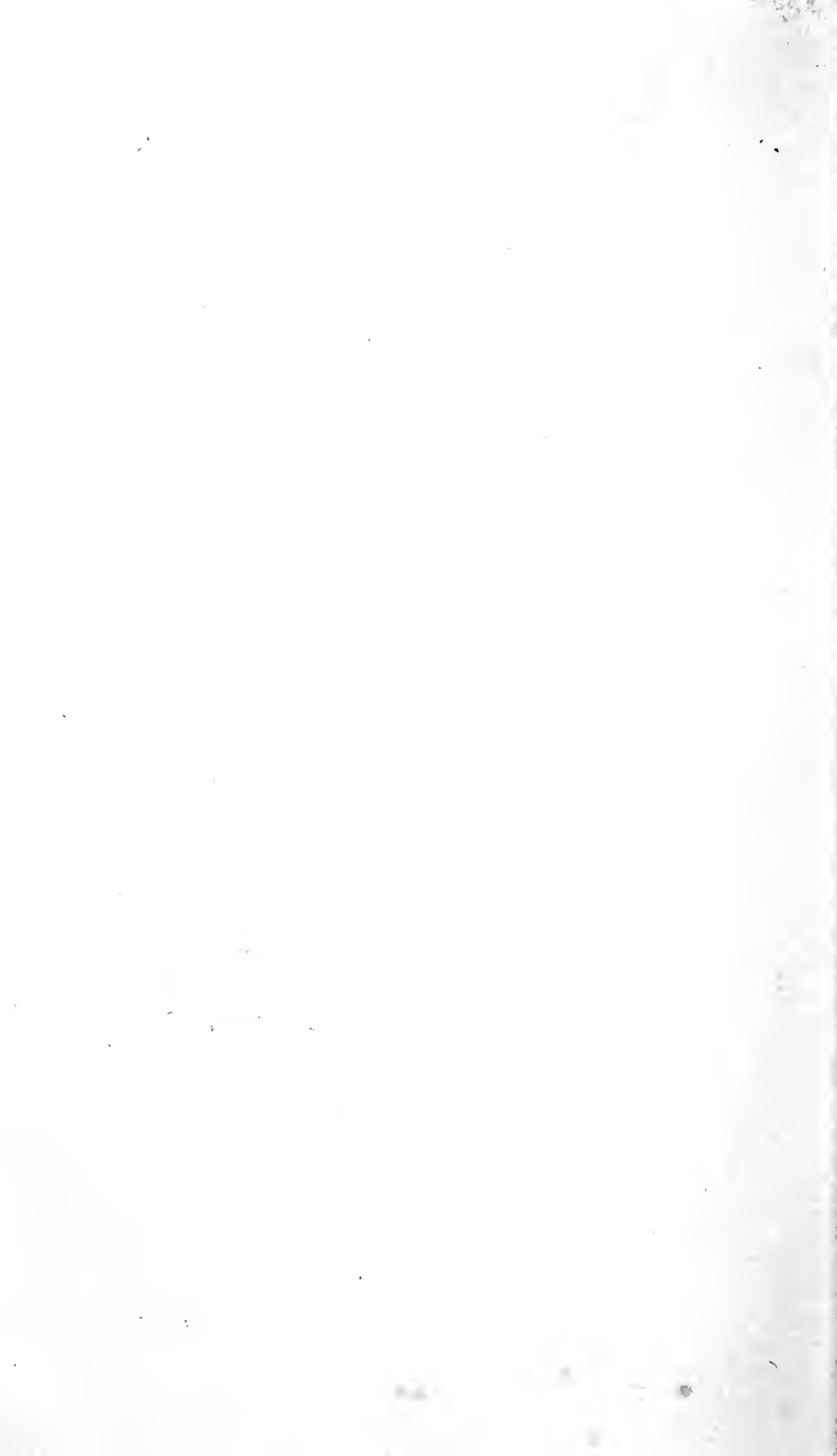
Idaho Building
Boise, Idaho

Attorneys for Appellants.

FILED

JUL 23 1959

PAUL P. O'BRIEN, CLERK



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*Appeals from the United States District Court
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Opening Brief for Appellants

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Eastman Building
Boise, Idaho

ELAM & BURKE
Idaho Building
Boise, Idaho

Attorneys for Appellants.

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IN THE
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For the Ninth Circuit

WICKAHONEY SHEEP COMPANY,

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and

BANK OF IDAHO (formerly Contin-
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Appellants,

No. 16,390

vs.

C. A. SEWELL, ORENE H. SEWELL
and ORVILLE R. WILSON,

Appellees

I

SUMMARY STATEMENT OF THE CASE,
JURISDICTION, PLEADINGS AND
PROCEEDINGS.

On May 8, 1957, plaintiffs and appellees, C. A. Sewell, Orene H. Sewell and Orville R. Wilson, commenced this action in the United States District Court for the District of Idaho, Southern Division, against Wickahoney Sheep Company, an Idaho corporation, and Bank of Idaho (formerly Continental State Bank), also an Idaho corporation. The complaint, in three counts, alleged first the breach by appellants of a contract of sale whereby appellees, as the sellers, agreed to sell, and Wickahoney

Sheep Company, as purchaser, agreed to purchase sheep and other personal property, demanding judgment thereon for the recovery of possession of all said property, together with all increase and lambs born of the sheep and all wool clipped or obtained from said sheep, or for the sum of \$225,-100.00 in the event the delivery of said personal property could not be had. In the second count, the appellees alleged the Bank of Idaho as the escrow holder of the contract, and that said Bank of Idaho had refused to deliver the executed copy of the contract and the bills of sale deposited with it as such escrow holder, appellees demanding that said documents be delivered by Bank of Idaho to them.

The third count in the complaint involved four chattel mortgages given by Wickahoney Sheep Company to Bank of Idaho covering the sheep and the increase thereof in question, and alleged that said mortgages constituted a cloud on the title of appellees sheep and the increase thereof, and requested that the same be removed of record. (3 to 15, incl.)

On July 19, 1957, appellants filed their answer and counterclaim in the action (19 to 32, incl.), and therein admitted that the plaintiffs and each of them, were citizens of the State of Nevada; that defendant Wickahoney Sheep Company and defendant Bank of Idaho were Idaho corporations. Plaintiffs' allegation of jurisdiction in the amount of \$3,000.00 was traversed, but the proof established the amount in controversy in excess of said

sum. By virtue of these admissions that the action was between citizens of different States and because the matter in controversy exceeded, exclusive of interest and costs, the sum of \$3,000.00, original jurisdiction existed in the District Court for the State of Idaho, under Title 28, USCA 1332.

In its answer as a separate defense, appellants set out an escrow agreement (27 to 32, incl.), under and by which the contract between appellees and appellant, Wickahoney Sheep Company, was escrowed with appellant Bank of Idaho, alleging that the pretended forfeiture on the part of appellees with respect to the contract was void, since it did not comply with the terms of said escrow agreement. As an additional separate defense and as a counterclaim, defendants Wickahoney Sheep Company, alleged fraud and misrepresentation on the part of appellees with respect to the sale of said personal property, defendant Wickahoney Sheep Company demanding judgment on its counterclaim in the amount of \$22,500.00.

Thereafter, appellant Bank of Idaho deposited with the Court all bills of sale and the executed copy of the purchase agreement hereinabove referred to, together with the original chattel mortgages in question. (34) On or about October 11, 1957, appellees filed a supplemental complaint (49, 50), alleging that subsequent to the notice of forfeiture given by appellees to appellant Wickahoney Sheep Company, the latter paid over to Bank of Idaho in excess of \$100,000.00, the same being the

proceeds from the sale of sheep, lambs and wool, being the subject matter of the contract as aforesaid, and demanding that said Bank of Idaho account to appellees for all of said moneys.

To this, appellant filed an answer. (82, 83). Upon motion of appellant Wickahoney Sheep Company (41), a receiver was appointed by the Court to take possession of all property of Wickahoney Sheep Company. (51, 52). The receiver was appointed on October 11, 1957. The property in the hands of the receiver consisted of the balance of the personal property in the possession of Wickahoney being subject to the purchase agreement from the appellees, and during the course of administration of the receivership, the same was liquidated, and after payment of all expenses and the receiver's fee, the sum of \$54,655.04 was deposited with the Court. Thereafter, Findings of Fact and Conclusions of Law were filed by the appellees (117 to 131, incl.), the same being objected to by the appellants (112), and the Court on December 18, 1958, entered judgment against Wickahoney Sheep Company in the sum of \$149,452.68, and against appellant Bank of Idaho in the sum of \$86,082.50, conditioned upon any payment by the Bank of Idaho being in partial satisfaction of the judgment against defendant Wickahoney Sheep Company. Judgment was also entered directing the Clerk of the Court to pay the sum of \$54,655.04 resulting from the liquidation by the receiver to the appellees in partial satisfaction of the judg-

ment against Wickahoney Sheep Company. (131, 132, 133).

The Clerk of the Court, on December 22, 1958, delivered to the appellees the documents theretofore deposited in the registry of the Court by the appellant Bank of Idaho, the executed copy of the purchase agreement and other related documents, together with the check of the Clerk for the receiver's balance of \$54,655.04. (134). Notice of appeal was filed January 12, 1959 by appellants. (140). The respective appellants, on January 12, 1959, filed separate appeals (136-140), and thereafter upon motion and stipulation by all parties and order of the Chief Judge of the United States Court of Appeals for the Ninth Circuit (292), the appeals were consolidated with a single record, only, required, and the appellants permitted to file one brief on appeal. It was further stipulated that the various exhibits be not printed but referred to by the Court and counsel as though printed and incorporated in the record. (275). Jurisdiction of this Court to hear and determine the appeal is based on 28 U.S.C.A., Secs. 1291, 1994, 2107, and Rule 73, Federal Rules of Civil Procedure.

II

SPECIFICATIONS OF ERRORS

I

That the Court erred in making and entering its Finding of Fact VI to the effect that Appellees "duly, regularly and properly" gave notice in writ-

ing of default, in that the evidence shows such notice was not so given in compliance with the agreement of the parties.

II

That the Court erred in making and entering its Finding of Fact VII to the effect that Appellees made demand on Wickahoney Sheep Company for delivery of the property, and that said property was wrongfully and unlawfully detained by said Company, in that the evidence is to the contrary.

III

That the Court erred in making and entering its Finding of Fact XI to the effect that Appellees had duly performed all condition by them to be performed, in that the evidence shows a failure on their part to so perform.

IV

That the Court erred in making and entering its Finding of Fact X, or so much thereof as finds that The Bank of Idaho wrongfully refused to deliver the escrowed documents, the evidence affirmatively showing that such refusal to so deliver was proper and lawful.

V

That the Court erred in making and entering its Finding of Fact XI to the effect that Wickahoney Sheep Company wrongfully sold sheep and lambs, and that the fair market value of the same,

at the time of forfeiture, was \$86,082.50, in that Wickahoney Sheep Company had a legal right to sell said sheep and lambs, and that there is no evidence of value thereof at the time of forfeiture.

VI

That the Court erred in making and entering that portion of Finding XII that finds fair market value of the property sold by the receiver to be the sum of \$62,370.18 at the time of forfeiture, in that there is no evidence in the record to support such finding.

VII

That the Court erred in making and entering its Finding of Fact XVI insofar as it finds Appellees entitled to possession of the property; that Bank of Idaho had knowledge that the moneys paid it were from the sale of said property, and that said Bank of Idaho wrongfully converted said moneys, for the reason that the evidence is to the contrary.

VIII

That the Court erred in making its Conclusions of Law III, V, VI, VIII, IX, XII and XIV, they being predicated on the Findings of Fact set forth above, the making of which has herein been specified as error.

IX

That the Court erred in making and entering

its final judgment against these Appellants for the reason that the same is contrary to the evidence and to the law.

III

STATEMENT OF FACTS

Appellees, C. A. Sewell and Orene H. Sewell, as Sellers, and Appellant, Wickahoney Sheep Company, as Purchaser, on December 15, 1955, entered into a Purchase Agreement for the sale and purchase of a sheep "spread" including ewes, bucks and miscellaneous equipment and personal property for the total purchase price of \$121,700.00, payable \$15,000.00 down, the balance of \$106,700.00 payable \$15,000.00 per annum on October 10 of each year thereafter. (Exhibit 18) (10-15).

Paragraph 5 of the Purchase Agreement covered the matter of default, providing for notice of claimed default in writing be given Purchaser, with ninety days within which to remedy the same. Further, it provided that in the event of forfeiture after notice given, Seller could retake possession of the property described, or its replacements, and retain all payments as liquidated damages.

Although the Purchase Agreement was executed December 15, 1955, possession of all the property was delivered to and received by Wickahoney Sheep Company between October 15 and 18, 1955. (235).

On the same date, coincidentally with delivery, the parties to the Purchase Agreement executed a

Memorandum Agreement (Exhibit 23), which recited the agreement covering the personal property and stated: "in consideration of the execution by Wickahoney of the Lease and Option Agreements" the Sewells would lease and give an option to buy Taylor Grazing Rights for 800 A.U.M.'s, with additional deeded lands of the Sewells to carry these rights. The price to be paid therefor, and the lands to be leased and optioned, to be fixed by a range management expert, Harley McDowell. McDowell made his survey, set aside an additional 360 acres of the Sewells' deeded lands, known as the Nit Creek Range, and set an option price on the 800 A.U.M.'s. of Taylor Grazing Rights on the lands, and gave his information in a report to the parties. (Exhibit 25). (232, 248, 257).

The Sewells also leased to Wickahoney Sheep Company certain lands upon which Wickahoney would run the sheep purchased. (Exhibit 17). This Lease is dated December 15, 1955, and states it is a modification of a prior lease between the parties dated October 18, 1955, covering personal as well as real property. The lands covered by the lease to Wickahoney were insufficient to carry the sheep sold, lacking carrying capacity for 2,000 head for two summer months and all 4,000 head for two winter months, so compliance by the Sewells with the agreement to sell additional grazing rights and deeded land was necessary to sustain the operation to Wickahoney. (258, 259, 260).

The Sewells transferred the Taylor Grazing Rights (Exhibit 20), but refused to sell or lease the base lands as agreed upon and as selected by McDowell. Pursuant to the requirements of Exhibit 23, Wickahoney's attorney, Lloyd Haight, prepared and submitted a lease of the grazing rights and an option to purchase the additional Nit Creek lands, to Appellee Wilson. (Exhibits 28 and 29, respectively). (248, 249, 250). Appellees would not execute the documents nor submit a counter proposal. (252). The lease and option of the additional rights and lands was sent to Appellees in September, 1956. (250).

On the date of execution of the Purchase Agreement (Exhibit 18), an executed copy thereof and Bill of Sale were escrowed with Appellant Bank of Idaho pursuant to a written escrow agreement, signed by all parties. (Exhibit 19). (178, 179). In part and in substance, the escrow agreement required that all default notices be mailed by it to the parties, the escrow holder not being required to recognize service in any other manner. Further, in the event of conflict between the escrow agreement and the Purchase Agreement, the escrow agreement would govern.

Wickahoney Sheep Company failed to meet the payment required in the Purchase Agreement on October 10, 1956. (150, 158, 167). Thereafter, Appellees prepared and sent a Notice of Default to Appellants (Exhibit 6), a copy of the same being received by Bank of Idaho on January 16, 1957,

and one by Wickahoney Sheep Company on January 17, 1957. No request was made of the Bank of Idaho to handle the default notice in accordance with the escrow agreement, and this was not followed by Appellees. (179, 253). On or about April 24, 1957, Appellees' counsel mailed to Appellant Bank of Idaho a letter (Exhibit 10), stating that the contract was forfeited and demanding possession of the escrowed instruments. (157, 158, 184).

No demand, written or oral, for repossession of the sheep and other property was ever made upon any agent or officer of Wickahoney Sheep Company, nor is there evidence that such officer or agents had knowledge of any such demand.

Wickahoney's sheep operation was financed through loans from The Bank of Idaho, commencing with a \$20,000.00 loan on October 17, 1955 and continuing to January 1, 1957, when its outstanding loan balance was \$100,000.00. In the interim, Wickahoney had repaid approximately \$50,000.00 to the Bank. (Exhibit 14). (74, 75, 165, 166). From June 21, 1956 through August 5, 1957, Wickahoney was engaged in selling the lambs, being the offspring of the ewes sold under the contract, and some of the older ewes. After the purported Notice of Default on January 17, 1955, sales of wools, pelts and lambs were made, totalling \$86,082.50. (Exhibit 13). (80, 163). The proceeds of the sales were turned over to The Bank of Idaho in payment of the Wickahoney indebtedness. (164, 165). (Exhibit 14).

Four Chattel Mortgages, as security for the loans, were given to The Bank of Idaho by Wickahoney, covering the contract property, bearing dates September 17, 1956, November 1, 1956, November 27, 1956 and January 5, 1957, all having been executed prior to the purported Notice of Default. (53, 54). Upon payment of the final loan as aforesaid, these Chattel Mortgages were satisfied. (53, 54).

In connection with their proof as to values of the replevined personal property, with the exception of one truck valued at \$1,000.00 as of April 20, 1957. (171), the record is devoid of testimony fixing fair market value of the personal property as of the alleged date of taking, April 17, 1957. Appellee Sewell, testifying as an expert, fixed the market value of the sheep and lambs as of July and August, 1957, and the wool as of March 19, 1957. (168, 169). This testimony corresponded with the Summary of Sales. (Exhibit 13). The only other evidence of market value in the record is found in the testimony of Appellees' witness Austin, who was also the receiver. His testimony was restricted entirely to the proceeds realized upon his liquidation of the properties *after* the litigation commenced. (191, 192, 193, 194). Appellants offered no evidence whatever of market value. Upon this evidence of market value, the Court predicated its findings of fact, conclusions of law and judgment.

The evidence shows Appellant Wickahoney expended \$79,726.00 in its operations during the ten months prior to October 31, 1956 (Exhibit 2), for a net loss of \$164.50. That the funds from the sales were used by it in payment of The Bank of Idaho loans and for the expenses of its operation. (78). From its operations between October 18, 1955 and September 30, 1956, Wickahoney had an operating loss in excess of \$50,000.00; and between October 1, 1956 and October 8, 1957, an operating loss of \$1,555.09. (Exhibit 27).

IV

SUMMARY OF ARGUMENT

(A) Since an action in claim and delivery tries only the question of possession, plaintiffs must fail in this action for the reason that the purported Notice of Default did not effect a forfeiture and appellant Wickahoney Sheep Company was lawfully in possession of the sheep, lambs and wool.

(B) There being no evidence in the record to sustain the Court's Findings as to market value of the property at the time of the alleged wrongful taking, the judgment based on such findings is erroneous.

(C) The Court erred in finding that prior to the commencement of the action, appellees had duly performed all of the conditions precedent of said Purchase Agreement upon their part to be performed. Appellees were in material default and were not entitled to declare a forfeiture.

(D) Assuming an effective forfeiture, and since there is no finding of a wanton or malicious taking, appellant Wickahoney Sheep Company should receive an offset for care and maintenance of the lamb crop. In addition, as title holders for security purposes only, appellees, in their recovery, should be limited to the balance due on the contract.

V

ARGUMENT

(A.) SINCE AN ACTION IN CLAIM AND DELIVERY TRIES ONLY THE QUESTION OF POSSESSION, PLAINTIFFS MUST FAIL IN THIS ACTION FOR THE REASON THAT THE PURPORTED NOTICE OF DEFAULT DID NOT EFFECT A FORFEITURE AND DEFENDANT WICKAHONEY SHEEP COMPANY WAS LAWFULLY IN POSSESSION OF THE SHEEP, LAMBS AND WOOL.

The Court found in Finding of Fact VI:

“That plaintiffs duly, regularly and properly gave notice in writing of the above mentioned defaults as provided in said Purchase Agreement.”

And in its Finding of Fact VII that ninety days after default, appellant Wickahoney Sheep Company wrongfully and unlawfully refused and neglected to deliver possession of said property to the appellees, and that the same were “wrongfully and unlawfully detained and withheld.” Further, in its

Finding of Fact X, the Court found that after the declaration of forfeiture, the Appellant Bank of Idaho wrongfully refused to turn over and deliver to appellees the executed copy of the Purchase Agreement and the Bills of Sale. As Conclusions of Law predicated upon the foregoing Findings, the Court concluded that the appellees duly, regularly and properly gave notice in writing of Appellant Wickahoney Sheep Company's failure to perform the Purchase Agreement.

The Court further concluded that a forfeiture was effected ninety days after the Notice of Default. That thereafter the Appellant Wickahoney Sheep Company wrongfully withheld the property being the subject of the Purchase Agreement, and thus appellees had the right to possession under the Purchase Agreement of all property being sold, including all lambs and increase born of said plaintiffs' sheep and then in possession of said Wickahoney Sheep Company.

Exhibit 18 is the original Purchase Agreement between the Appellees, C. A. Sewell and Orene H. Sewell, and Appellant Wickahoney Sheep Company. Paragraph (5) of this Purchase Agreement reads in part, with respect to default and claimed forfeiture:

"Sellers shall give Purchaser notice of such claimed default in writing, addressed to Purchaser * * *, and thereafter Purchaser shall have ninety days within which to remedy the claimed

default. * * * In the event the Purchaser fails to remedy the claimed default within the ninety day period, Seller may claim a forfeiture of this agreement, and shall have the right to retake possession of the personal property herein described, or its replacements, and the Sellers may retain all payments made hereunder as liquidated damages.”

The Purchase Agreement dated December 15, 1955, was executed by the sellers on that date and by Appellant Wickahoney Sheep Company on December 24, 1955.

Exhibit “A” to the Answer and Counterclaim, being Exhibit 19, consists of an escrow agreement dated December 15, 1955, the same date as the Purchase Agreement, between C. A. Sewell and Orene H. Sewell, Wickahoney Sheep Company, and Continental State Bank (now Bank of Idaho). In the event of default being declared by the seller under the terms of this escrow agreement (Exhibit 19), the seller is required to deliver to the Bank notification of the default, in duplicate, with written instructions to the escrow holder to mail the original thereof to the purchaser by registered mail. The escrow agreement further provides:

“All notices given pursuant to the terms of any agreement placed in escrow herewith, must be given through the escrow holder as hereinbefore provided, and said escrow holder shall not be required to recognize service of notice given in any other manner.”

“It is further agreed that if any part of the escrow agreement and this agreement are in conflict, then the provisions of this agreement shall govern.”

The record, without equivocation, fully establishes that notice of default was not given in the manner required. After the purported notice of default and forfeiture of the Purchase Agreement, appellees made demand upon defendant Bank of Idaho for the escrowed documents. The demand was resisted by Appellant Wickahoney Sheep Company.

It is the contention of the appellants that the purported notice of default in fact did not operate to effect a forfeiture of the Purchase Agreement. In an action for claim and deliver the right to possession of the property is the main issue.

As said in *American Fruit Growers, Inc. v. Walmstad*, 44 Idaho 786, 260 P. 268:

“In an action to recover personal property, it is essential for the plaintiff to show that he is entitled to immediate possession. In such an action he is not required to establish ownership, but merely a right to the immediate possession. The action is essentially a possessory one, and ownership is only incidental to the main issue. (Citations).

“While it is true that the complaint asserts appellant’s ownership of this property, that allegation is immaterial, the right of possession being

the controlling issue, the question of ownership being only incidental thereto.”

In this connection, see also:

Largilliere Company, Bankers, v. Kunz, 41 Idaho 767, 244 P. 404;

Commercial Credit Company v. Mizer, 50 Idaho 388, 296 P. 580;

Cunningham v. Stoner, 10 Idaho 549; 74 P. 228.

Smith v. Washburn-Wilson Seed Co., 40 Idaho 191, 232 P. 574, contains the following reference to this subject:

“Primarily the right to possession and not necessarily the title to the property is the controlling question. One may have title and still not have the right to possession, and conversely, one may have the right to possession without title.” (p. 195, 196).

Appellees having sued in claim and delivery, they must, in order to maintain the action show their right to possession of the subject matter of the purchase contract between the parties. Appellees cannot do this unless they can sustain their contention that a forfeiture of the contract was effected, entitling them to retake possession, for it is a basic principle that a conditional vendee is entitled to retain and keep in possession the property sold even when in default, until a forfeiture has become effective.

As stated in *Peasley v. Noble*, 17 Idaho 686, 107 P. 402:

"This contract was in part executed. The possession of the property had been delivered to the vendees, and a large part of the purchase price had been paid. The forfeiture clause in the contract was purely and wholly for the protection of the vendor. The forfeiture did not take place, however, by operation of law. It was necessary for the vendor to do some specific act in order to put an end to the contract. He was empowered to "immediately take possession of said sheep and increase and any clip of wool, etc." The vendor failed and neglected to avail himself of this provision of the contract until after the vendees had disposed of the sheep involved in this action. So long as he allowed the parties to continue in possession of the sheep without any change or alteration in the original contract, they will be deemed to have still been operating under the contract." (p. 404)

To the same effect:

Coffin v. Northwestern Mutual Fire Ass'n, 43 Idaho 1, 249 P. 89;

Firpo v. Superior Court (Cal.), 246 P. 165;
Adams v. Wood (Mich.), 16 NW 788.

It is, of course, axiomatic that forfeitures are not favored either in law or in equity, and that where a contract is subject to forfeiture, the party declaring the forfeiture must comply exactly with

the literal terms of the contract with respect thereto in order to invoke a forfeiture. 12 Am. Jur. 1016 (Contracts, Sec. 436), states the principle:

“Forfeitures are not favored by the law; indeed, they are regarded with disfavor. It is well settled that forfeitures by implication or by construction, not compelled by express requirements, are regarded with disfavor. Contracts involving a forfeiture cannot be extended beyond the strict and literal meaning of the words used.”

In *Wonder Products v. Blake*, 47 NW 2d 61 (Mich.), it is stated at page 64:

“It is true that after a purchaser fails to make a payment, the vendor may choose to forfeit the purchaser’s interest in the contract, but this can be done by only declaring a forfeiture. *Donelly v. Lyons*, 173 Mich. 515, 139 NW 246. *Hop Farm Corp. v. Neef*, 294 Mich. 160, 292 NW 689. The vendor, however, may not ignore the provisions of a contract in regard to foreclosure in the event of a default in payment for personal property.”

The law in Idaho is well settled that, in order to terminate a contract, it is necessary that the party so doing comply strictly with the provisions of the forfeiture requirements of the contract under which the parties are operating. *Marks v. Strohm*, 65 Idaho 623, 150 P 2d 134 (1944), involved a contract for the purchase and sale of land. From the syllabus of the Court at 623:

“Where contract for installment sale of land provided for written notice of termination of contract on default setting forth such default, vendors were bound by terms of notice of termination stating that default consisted of failure to pay delinquent taxes on vendor’s lands.”

The evidence disclosed that the purchaser of the land had paid the taxes specified as being unpaid in the notice of default prior to the giving of said notice, and that the seller therefore, was not entitled to rely upon any other default by the purchasers in the contract, even though the default otherwise existed. The Court thus insisted upon the strictest compliance by the vendor of the property with the forfeiture provision of the contract document.

The latest Idaho case on this subject is *Stockmen’s Supply Co. v. Jenne*, 72 Idaho 57, 237 P. 2d 613 (1951). Here the purchaser of certain lands under a written contract of sale gave up possession of the land to the vendor for a period of more than seven years. The vendor then brought suit against the purchaser to quiet title, and the judgment of the trial court quieting title in the vendor was reversed on appeal, the Court stating that the vendor had never given the vendee notice of termination of the contract pursuant to its terms, and therefore the vendee’s rights to the land had not been terminated. Strict compliance with the contract, even after a seven year “abandonment,” was required.

It is admitted, of course, in this case that the forfeiture provisions of the Purchase Agreement between the parties was complied with by the appellees. This merely provided the appellees should give the purchaser-appellant notice of any claimed default by registered mail at its office, and no forfeiture could become effective until ninety days had lapsed from the date of such notice. The parties, however, made and entered into on the same date as the original Purchase Agreement, an escrow agreement with the third party, Bank of Idaho. As pointed out, there was a deviation in the escrow agreement in connection with the forfeiture from the forfeiture requirements of the basic agreement. The escrowing of a contract of sale with the related documents, bills of sale, deeds, etc., with a bank is a customary method of doing business. While the bank escrow agreement provided for thirty days within which to rectify default, it provided for a specific method of declaring a forfeiture, that is, delivery of the specific notice of default to the bank *the mailing by the bank of the notice to the defaulting party*; and the agreement further provided that the bank need not recognize service in any other manner; that in the event of conflict, it should govern. This agreement was executed voluntarily by all three parties to it, and it must be read in conjunction with the original agreement. *Wiesenberger v. Mayers*, 117 N.Y. Supp. 2d, 557.

When parties provide in an escrow agreement for a definite and certain procedure for declaring

a forfeiture, the courts are insistent that a strict and literal compliance with such terms is the only act to be recognized before such forfeiture is effective. *Malta, et ux, v. Phoenix Title & Trust Company*, 259 P. 2d 554, involved an action by vendors who sold realty owned, subject to contract, to purchaser, who assumed vendors' contract, whereafter the rights of parties under their respective contracts were forfeited when the purchaser defaulted and vendors failed to make the payments under the original contract, to recover for loss of realty from the escrow agent, on the ground that the agent acted negligently. The action of the trial court in dismissing the complaint was sustained on appeal, the Court stating, at page 557:

“The Title Company could not alter the legal rights between the parties to the escrow agreements. It is true that an escrow agent is a trustee and must act in strict accordance with the terms of the escrow agreement or it will be liable in damages for any loss suffered by reason of any departure from those terms; however, in the instant case it does not appear that there was any dereliction of duty upon the part of the defendant and hence the plaintiffs have no one but themselves to blame for any loss they may have suffered. They cannot visit it upon defendant.”

In *Davisson v. Citizens National Bank of Roswell*, 113 P 598 (N.M.), one Davisson, acting as

agent for a purchaser, entered into an agreement to purchase certain real property. The moneys in payment therefor were deposited with the defendant bank, together with a memorandum stating the conditions under which the bank should hold the money. Thereafter, the plaintiff made demand on the bank for the money, but the bank turned the money over to the vendor of the property. Suit was instituted by Davisson against the bank to recover his commission on the sale. The appellate court, after observing that the Court below determined the bank's liability to be fixed and limited by the memorandum, stated at page 599:

“Admitting the correctness of this holding for the sake of argument, the question then is, did the bank fulfill its duty to the appellants as fixed by the memorandum? To this question we think the reply should be in the negative, for the reason that no where in the memorandum was the bank authorized to make any delivery of any paper, money or anything. Had the appellants both agreed that Mr. Berryman should have his money or check back, then the bank would have been relieved from any liability, but it owed just as much duty to the appellants as it did to Berryman, and should not have taken sides, and, when it failed to secure appellants' consent, it should have held the escrow and let the parties either come to some agreement among themselves or appeal to the courts, when the appellee could have interpleaded the money into

court and secured its acquittance. However, it took sides in this matter, and will be held, as it should be, to have acted at its peril and to be responsible to appellants for the fund if they can show a right to the same under the contract made with Berryman, either in its original form or as amended by the parties to it. The law governing the duties of the bank in this case is well stated by Page in his work on Contracts: "The depositary of an escrow is regarded as an agent of both obligor and obligee, and he can neither return the deed or other instrument to the former without the latter's consent, nor save upon the fulfillment of the agreed conditions deliver it to the latter without the former's consent." 2 Page, Contracts, 585. There happened no condition, as set forth in the memorandum, upon the fulfillment of which or failure to fulfill the bank was directed to return the papers to either party."

To the same effect:

Jolin v. Spira, 210 P 2d 704 (Cal.) ;

Loyd v. Southwest Underwriters, et al, 169 P 2d 238 (N.M.) ;

Sweifach v. Scranton Lace Company, 156 Fed. Sup. 304 (Pa.) ;

Roberts v. Carter & Potruch, 295 P 2d 515 (Cal.).

In Dunlap v. Albuquerque National Bank, 247 P 2d 981 (N.M.), the defendant, as escrow holder

of a construction contract between the plaintiff and a contractor, released certain funds in escrow to the designated contractor, upon certification by an architect as provided in the agreement, even though the bank had been warned that the contractor had defaulted in the performance of the contract and the residence had in fact been constructed by another contractor. It was observed that a copy of the contract was in the possession of the bank. In addition, upon receiving the payment from the bank, as escrow holder, the contractor immediately paid back over to the bank the said moneys on an indebtedness that he owed the bank. This suit was to recover the purportedly unauthorized payment. On page 984, we find:

“The only contract by which the bank was bound was a letter containing the terms of the escrow which had been accepted by it in writing, endorsed on the bottom of the escrow letter. * * *

“However, the bank’s contract was the escrow letter. It was not signatory of the contract between the plaintiffs and Algire * * *

“Nevertheless, it was wholly ineffective unless the bank was bound by the contract between the plaintiffs and Algire, which it never signed nor agreed to observe. We have held that the contract was not a part of the escrow agreement between the bank on the one hand and the plaintiffs and Algire on the other. * * *”

The Court then quoted with approval from 19 Am. Jur. 435, Sec. 17:

“Where a person assumes to and does act as the depository and escrow, he is absolutely bound by the terms and conditions of the deposit and charged with a strict execution of the duties voluntarily assumed. It is not in his province to interpret or construe a contract where he has a duty to perform; he must be guided in his duty by what the contract says.”

And in commenting upon the contention that the bank paid out the money erroneously to the contractor, who received the money, then turned around and paid the money back to the bank on a debt owed by the contractor, at page 983 stated:

“Unquestionably, this fact is the major circumstance causing the plaintiffs to feel that the bank had wrongfully diverted funds subject to their order contrary to terms of the escrow. It resulted in this action to recover the amount thereof as moneys belonging to the plaintiffs, claimed to have been embezzled by the bank and appropriated to its own uses. However, if the money actually belonged to Algire under the terms of the escrow, it was his to do with as he pleased and the mere fact that he immediately applied it on indebtedness owing to the bank, in no manner detracts from his right to have done so.”

In *Montgomery v. Bank of America, National Trust & Savings Ass’n*, 193 P 2d 475 (Cal.), in connection with the unauthorized act of the es-

crow holder in making changes in a deed which was escrowed with it, the Court, at 478, observed:

“If the subject of this action were personal property, defendant would be answerable in damages. As a depositary, an escrow holder is required to obey the instructions of the parties as to delivery of property deposited with him. (Citations).”

It is submitted that the appellees, contrary to the terms of the escrow agreement, attempted to serve on Defendant-Appellant Wickahoney Sheep Company directly, and not through the escrow holder, a notice of default, and thereafter to declare a forfeiture of the contract. At no time have either of the appellants recognized the validity of this notice, relying instead, as we feel they had the right to do, on specific compliance with the terms of the escrow agreement with respect to the forfeiture. If the forfeiture was ineffective, then the contract itself was not terminated, and not only do appellees have no right to question the bank's refusal to recognize the forfeiture, but in addition the contract between the appellant Wickahoney Sheep Company and appellees is still in force and effect, and the trial court erred in entering its judgment in favor of appellees and against both of these appellants.

(B.) THERE BEING NO EVIDENCE IN THE RECORD TO SUSTAIN THE COURT'S FINDINGS AS TO MARKET VALUE OF THE PROPERTY AT THE TIME OF THE ALLEGED

WRONGFUL TAKING, THE JUDGMENT BASED ON SUCH FINDINGS IS ERRONEOUS.

It is submitted that the Court erred in awarding judgment against Wickahoney Sheep Company in the amount of \$149,452.68, and against the Bank of Idaho for the sum of \$86,082.50, which was paid to it by Wickahoney. There is absolutely no evidence in the record upon which to make a determination of values *at the time of the forfeiture*.

The Notice of Default sent to the Bank was received January 16, 1957. Therefore, assuming for this discussion, the Notice of Default to be effective ninety days from the date received, this would make the wrongful taking on April 18, 1957, being the date when right to possession ceased. Bearing in mind these dates, it is basic that in an action for replevin or the statutory action of claim and delivery as here involved, if the property cannot be redelivered to the plaintiff, then he is entitled to its value, the value to be determined as of the time of the taking.

In its Finding of Fact VII, the Court determined that the wrongful taking, insofar as Wickahoney Sheep Company is concerned, occurred ninety days following the receipt of default when that appellant wrongfully refused to turn over and deliver the property and detained the same from the appellees. Finding of Fact IX discloses that between July 2, 1957 and August 5, 1957, inclusive, appellant Wickahoney Sheep Company sold sheep and

lambs for the total purchase price of \$86,082.50, and that the fair and reasonable market value of said lambs and sheep sold by Wickahoney "at the time of the forfeiture of said purchase agreement was the sum of \$86,082.50."

The wrongful taking, if one there was, having occurred in April of 1957, the only proof of the value of the sheep prior to the trial, was from the sales made in July and August by Wickahoney Sheep Company. Appellee Sewell, testifying as an expert, testified as to the fair market value of lambs during July and August of 1957, and further, that lambing was normally begun in the middle of January and that the lambs stayed on their mothers until shipment, usually in July or August. No testimony whatsoever is in the record as to the value of suckling lambs in April, 1957, the time of the alleged forfeiture.

Again the testimony of plaintiffs' witness Austin (also the Receiver), who testified as an expert, was absolutely confined to the market value of the sheep sold subsequent to the time he took possession of the same as receiver, and particularly as to sheep sales in November of 1957. No testimony was elicited from this witness as to the value of the sheep and lambs at the time of the purported forfeiture. And yet the Court's finding recites that on or about October 9, 1957, the balance of the property was turned over to the Receiver Austin, and subsequently sold by him, and the sum for which he sold this property *was the value of the*

property at the time of forfeiture. The witness also testified as to the value of lambs in July and August, 1957, and that his sales were made at the then fair market value. No testimony was given as to the value of lambs at the time of the forfeiture.

Thus, the value of the property at the time of the taking was never determined, and there is not one iota of evidence in the record upon which to base the Court's Findings or Conclusions. There is no proof and none was put in as to the value of the property at the time of the alleged forfeiture. The Court, having used figures which were clearly established to have represented values at various times after the time of taking and after commencement of the action, did not render a judgment for the correct value. It has been long established in Idaho that the measure of damages in a claim and delivery or replevin action, is the value of the property at the time of the taking. In *Cornwall v. Mix*, 3 Idaho 687, 34 P. 893, it is stated:

“The measure of damages in actions of replevin, where the property sought to be recovered has a usable value, is the value of the property at the time of the taking, with the value of its use from the time of the taking. The instruction upon this point asked by plaintiff correctly states the law, and should have been given. Its refusal was error.” (p. 894)

Again in *Tannahill v. Lydon*, 31 Idaho 608, 173 P. 1146, the Court on appeal, approved the following instruction given by the trial judge as to the measure of damages in a claim and delivery action:

"The jury is instructed that in an action of this character if it is shown by a preponderance of the evidence that the plaintiff was the owner of the property in controversy, which was taken by the defendant, and entitled to the immediate possession thereof, and that said taking was wrongful, the measure of plaintiff's damages herein is the value of the property so wrongfully taken at the time of the taking, with the reasonable value of the use of the said mare from the time of the taking to this date."

In *Unfried v. Libert*, 20 Idaho 708, 119 P. 885, the law is stated as follows:

"But where, as in this case, the facts show that the appellant wrongfully took possession of the mortgaged property and retained the same and converted such property to his own use or permitted it to be lost or injured or destroyed, he is responsible to the owner for the market value of such property at the time the same was taken." (p. 891-892)

Precisely in point is the case of *Armour v. Seixas* (Wash.), 141 P. 308, which involved a claim and delivery action for the repossession of an automobile. The complaint alleged a value to the automobile of \$1,000.00, which was denied by the answer of the defendant. At the trial no proof what-

ever was put in of the value of the automobile at the time of taking or otherwise. There was evidence in the record that at the time the automobile was originally sold to the plaintiff the value was \$1,000.00, and the wrongful detention from the plaintiff was approximately six months later. The Court, sitting without a jury, found the value of the automobile at the "time of trial" at \$1,000.00. From the opinion on appeal:

"Obviously a finding of value by the Court is also essential to sustain the judgment where the cause, as in this case is tried to the Court without a jury. * * *

"The finding that the automobile was actually worth \$1,000.00 at the time of the trial cannot be sustained upon either theory. It was immaterial in any event, according to what we believe the better rule under a statute such as ours. The value of the machine at the date of its conversion in December, 1911, was the material thing, not its value at the time of the trial in March, 1913. (Citations)"

Hager v. Gordon, 171 F 2d 90 (C.C.A. 9), involved a replevin action for delivery of a boat and barge. The plaintiff demanded the return of the vessel or the sum of \$25,000.00. The jury was instructed that the value of the vessel was \$55,000.00. In the Court's opinion, Judge Orr stated at page 92:

“The evaluation thus placed on the property is erroneous in two respects. In the first place, appellant alleged a value of \$25,000 in his complaint; hence, he was limited to that amount of recovery in the event the boat and barge could not be delivered. (Citations). Further, the sole testimony from which the \$55,000 figure was taken related to the value of the boat and barge when new. While the cases are not uniform as to whether valuation in an action for recovery of personal property should be measured as of the time of a wrongful taking or as of the time of trial, none suggests the values should be as of the time when the property was new. (Citations). The proper measure of value in the instant case was at the time of the alleged wrongful taking.”

Without evidence to support a finding of market value of the sheep, wool and lambs at the “time of taking,” the Court could only speculate that the values shown for July, August and November, 1957 were the same as those on the date of taking, April 18, 1957. The livestock and wool markets traditionally fluctuate a great deal, with substantial variations in market quotations over short periods of time. On April 20, 1957, was the sheep and lamb market up or down? What about the wool market? Without the facts, we can only guess—we submit an essential element of appellees’ case is missing—evidence of value at the time of taking.

(C.) THE COURT ERRED IN FINDING THAT PRIOR TO THE COMMENCEMENT OF THE ACTION, APPELLEES HAD DULY PERFORMED ALL OF THE CONDITIONS PRECEDENT OF SAID PURCHASE AGREEMENT UPON THEIR PART TO BE PERFORMED. APPELLEES WERE IN MATERIAL DEFAULT AND WERE NOT ENTITLED TO DECLARE A FORFEITURE.

All of the property, subject to the contract (Exhibit 18) was turned over and delivered to Wickahoney Sheep Company between October 15 and October 18, 1955. (235). On October 18, 1955, and prior to the execution of the Purchase Contract, (Exhibit 18), on December 15, 1955, a Memorandum Agreement was entered into by and between the Sewells and Wickahoney Sheep Company, referring to the Coig property, which consisted of real property, livestock and other personal property. On December 15, two documents were negotiated between the parties, the Purchase Agreement and the Lease of the real property which was to hold and contain the sheep. The record amply supports that the property covered by these two documents was identical with the property referred to in the Memorandum Agreement, in other words, the Coig sheep spread. Under the Memorandum Agreement, the Sewells agreed to transfer or lease to Wickahoney Sheep Company, Taylor Grazing Rights for an additional 800 A.U.M.'s, with an option to purchase said rights, and also a Lease and

Option to purchase sufficient deeded lands from the Sewells to meet the requirements of the United States Grazing Service with respect to base lands, said lands to be adjacent and accessible to the Coig property. The land Lease (Exhibit 17) was assigned to the Ruby Company, and the Ruby Company then orally leased the property back to Wickahoney Sheep Company for the base rental and taxes involved. (252). In the Memorandum Agreement (Exhibit 23), the parties agreed that one Harley McDowell would select and then place a value upon the rights and deeded land to be transferred. Harley McDowell then did make an appraisal of the lands involved and selected the additional base land which would be required from the Sewells to maintain the bands of sheep. Witness McDowell testified as an expert and stated that the lands leased in connection with the sale under the Purchase Agreement were not adequate to run the 4,000 head of sheep, the subject matter of the contract. As a result of the appraisal made by Mr. McDowell, it was testified that the attorney for Wickahoney, Lloyd Haight, prepared a Lease and Option (Exhibits 28 and 29) which were submitted to appellees covering the land which they had agreed to transfer to the Wickahoney spread, but these papers were never executed by the plaintiffs, nor was a counter proposal ever made by the plaintiffs. As a matter of fact, it was necessary for the defendant to rent additional lands for grass to hold its sheep, from the Sewells, as shown by defendant's Exhibit 24.

The Purchase Agreement contemplated the sale of the personal property; the Lease supplied the land upon which the spread would be maintained, and in addition, appellees agreed that additional base land would be taken out of their property, leased and optioned to Wickahoney in order to run the 4,000 sheep. The record is clear that all of those documents tie together and were necessary for an effective sheep operation. The record therefore shows that at the time of the alleged attempted declaration of default and forfeiture, the appellees themselves were not in compliance with the terms of their agreement, and thus the Finding of the Court to the contrary is erroneous. In this connection, the testimony, in broken english, of appellant's witness Lezamiz, is quite confusing, but it is clear from the record that additional base lands were required to run these sheep, and there was inadequate summer range so to do, which would be augmented by the deeded ground with the 800 A.U.M.'s. of Taylor Grazing Land which appellees agreed to, but did not transfer.

At the time Appellees served Notice of Default and also at the time they declared the purported forfeiture, they were in substantial default of their agreement to transfer their additional deeded lands to Wickahoney to support the 800 A.U.M.'s. of Taylor Grazing Rights. Although such transfer was prepared by Wickahoney's counsel and submitted, appellees refused to comply.

We repeat, in law or equity, forfeitures are abhorred. Appellees' right to recover is predicated on right to possession. If the agreement is not forfeited, then appellees have no possessory right—it remains in appellant, Wickahoney Sheep Company.

To sustain this position, we refer to a recent Idaho decision, *Huggins v. Green Top Dairy Farms, Inc.*, 75 Idaho 436, 273 P 2d 399. Here plaintiffs, as vendors, sold to defendant, under conditional sale contract, a dairy business, including real and personal property. Plaintiffs gave notice of default on part of defendant in failing to meet certain payments, and for other items of default. Forfeiture was then declared and plaintiffs demanded possession of the property, which was refused. Suit was then instituted for possession of the property and for appointment of a receiver. The evidence developed that at the time defendant was allegedly in default, the plaintiffs had not delivered a deed and had failed to perform other requirements of the contract, including the appointment of an agent to represent the plaintiffs in additionally required negotiations with defendant (there being seven plaintiffs). Judgment for the plaintiffs was reversed on appeal.

We quote from the opinion:

“Further, at the time the notice was given and this action instituted, and for a long time prior thereto, plaintiffs were and had been in default under the contract in several material particulars. They did not deliver the deed and bill

of sale provided for in the contract, nor did they appoint an agent as therein required to represent them in dealings and negotiations with defendant. They failed to perform on their part the terms of the contract which would have made a determination of plaintiffs' unliquidated claim possible.

"The failure of plaintiffs to designate an agent with authority to represent them in negotiations and dealings with defendant was a matter of importance. * * *" (p. 405)

"As the plaintiffs in this case had refused to perform their part of the contract in several particulars, they were not in a position to repudiate the entire contract and demand performance relative to payment for the merchandise and other unliquidated sums. 12 Am. Jur. 959, Sec. 382. Further, one cannot declare a forfeiture of a contract where he himself is materially in default. *Giffin v. Faulkner*, 50 Idaho 190, 294 P. 521." (p. 406)

In *Giffin v. Faulkner*, 50 Idaho 190, 294 P. 521, at p. 522, we find:

"Appellants title to the mortgage which they seek to foreclose, derived under the contract, is necessarily based upon a forfeiture. Forfeitures are not favored by the Court. (Citations).

"One may not declare a forfeiture while he himself is in default. *Walsh v. Coghlan*, 33 Idaho

115, 190 P. 252; *Kesler v. Pruitt*, 14 Idaho 175, 93 P. 965."

We respectfully submit that it was a material breach of appellees' agreement when they failed, refused and neglected to transfer the additional base lands owned by them, and as selected by McDowell in accordance with the agreement of all parties, to Wickahoney. Under the law, therefore, they were in no position to and could not effect a valid forfeiture.

(D.) ASSUMING AN EFFECTIVE FORFEITURE, AND SINCE THERE IS NO FINDING OF A WANTON OR MALICIOUS TAKING, APPELLANT WICKAHONEY SHEEP COMPANY SHOULD RECEIVE AN OFFSET FOR CARE AND MAINTENANCE OF THE LAMB CROP. IN ADDITION, AS TITLE HOLDERS FOR SECURITY PURPOSES ONLY, APPELLEES IN THEIR RECOVERY, SHOULD BE LIMITED TO THE BALANCE DUE ON THE CONTRACT.

It is noted that the original contract price was \$121,700.00. Appellants made a payment against this purchase price of \$15,000.00, leaving a balance due of \$106,700.00 on the contract. Appellant Wickahoney took possession of the property until turned over to the receiver, and while it received from the sale of sheep, lambs and wool during the course of the time that it held the property, it expended a large sum, as shown by the evidence, to maintain and pay the expenses of the operation. The judgment of the Court does not award appellees any

amounts for lambs and wool sold *prior to the declaration of forfeiture*, but it does award them the proceeds from the sale of sheep, lambs and wool sold by Wickahoney Sheep Company subsequent to the Notice of Default. The total amount of the judgment is \$149,452.68 against Wickahoney Sheep Company. This amount is approximately \$43,000.00 over and above the original contract price. Remaining in the receiver's hands after liquidation of the property delivered and turned over to him and after payment of expenses of receivership, is the sum of \$54,655.04 already delivered into the hands of appellees. This amount, when added to the purported fair value of the property in the hands of the receiver, totals the judgment entered against Wickahoney Sheep Company. The Court allows nothing for the care and maintenance of the sheep, the lambs, or the expenses of the operation, but gives to the appellees the value of the property without consideration for the expense of maintenance, which is an unconscionable recovery.

Appellees have asked for return of the property or its value. They have not asked for damages, punitive or otherwise. It is the general rule that where the plaintiff receives the value only of the personal property rather than its return he is not entitled to damages for the value of use of the property.

In this case, such value for use would be the proceeds from the sheep, that is, the lambs and wool produced therefrom. 46 Am. Jur. Sec. 145,

p. 79 (Replevin), 77 CJS 206, Sec. 280 (b) (Replevin).

While appellants did not plead a counterclaim or offset for the cost of taking care of the herd, the rule in this connection is stated as follows:

“Where the taking is in good faith the general view seems to be that if the value of the property is enhanced by the skill and labor or money of the wrongdoer, the owner is entitled to a recovery of the property or its enhanced value, less an allowance to the innocent wrongdoer of an amount equal to the difference between the original and increased value of the property, or the value of the property in its converted form, less the value of labor expended with a limitation in some jurisdictions that such expenses cannot exceed the increase in the value of the property

* * *.” 77 CJS 198 (Replevin Sec. 273)

See also: *State v. Shovelain Carpenter Company* (Minn.) 64 NW 81.

Here, Wickahoney Sheep Company held the sheep under claim of right originally and retained the sheep on its bona fide claim that the Notice of Default was improperly given. Thus, there should be set off against the value of the sheep and increase at the time of the wrongful detention, the expenses of the defendant in producing, caring for and maintaining the increase. We note further that the Court has made no finding that defendant's withholding was wanton or malicious, and it is

submitted that, even though the Notice of Default and forfeiture be declared effective, that the appellant Wickahoney Sheep Company was in good faith in demanding literal compliance with the forfeiture provisions of the escrow agreement. In *Guerin v. Kirst* (Cal.), 202 P. 2d 10, 7 ALR 2d 922, where the defendant was a bona fide innocent purchaser from the conditional vendee, the Court found that damages for detention of a tractor was the reasonable value thereof less the cost of repairs and upkeep on the tractor. The Court was of the opinion that such damages must be reasonable and not disproportionate to the original contract price.

The Purchase Agreement (Exhibit 17) provided in part, in the event of forfeiture that the seller (appellees) "shall have the right to take possession of the personal property, herein described, or its replacements, * * *." There was no provision in the Agreement prohibiting the purchaser from mortgaging the property and it is clear that a conditional vendee of property has a right to mortgage such property.

"It is generally recognized that a conditional vendee acquires an interest or special property which he can sell, mortgage, lease, exchange, make a gift of or otherwise dispose of without consent of the vendor." 47 Am. Jur. 132 (Sales, Sec. 924).

The Courts in Idaho have recognized such a special interest, the leading case thereon being *Coffin v. Northwestern Mutual Fire Ass'n*, 43 Idaho 1, 249 P. 89.

"The essential incidents of property are transferred to the vendee along with possession and right of use of the property, as if the property were his own, and all that remains is his debt entitled to the property as security."

See also: *Peterson v. Universal Insurance Company*, 53 Idaho 11, 20 P. 2d 1016.

And prior to a forfeiture, and even though he be in default, the conditional vendee may mortgage, sell, or otherwise dispose of his interest in the property to a third party. *National Cash Register Company v. Wapples* (Wash.), 101 P. 227, 87 ALR 944. It is suggested therefore, that the conditional vendee, appellant *Wickahoney Sheep Company*, had the right to mortgage to the Bank, and it had in the absence of any restriction in the contract, implied authority to sell lambs and wool resulting from the band of sheep sold. The implied authority to sell, at least before default, is apparent from the judgment of the Court. And since, as is maintained, no forfeiture existed, the proceeds from the sale of lambs and wool could properly be applied to the indebtedness to the Bank.

It is basic that the conditional vendor holds title merely for security purposes, and the possessive right and the property right is in the conditional

vendee. In *Road Equipment & Material Co. v. McGowan* (Miss.), 91 So. 2d 554, it is stated that where a plaintiff has a limited interest in the chattel, by way of security for payment of the balance due on the purchase price, "the judgment should be for the return of the personal property, or in the alternative, for the value of the plaintiff's interest therein measured by the balance due with interest and damages." (p. 556). Also in *Hickman-Williams Agency v. Haney* (Neb.), 40 NW 2d 813, the Court quotes with approval the following from *Creighton v. Haythorn* (Neb.), 68 NW 934:

"Where the defendant in an action of replevin claims a special interest only in the property in controversy by virtue of a mortgage or other lien, his measure of damages in case the property cannot be returned is the amount of his lien with interest and costs, within the value of the property."

Thus the appellees were in that precise position—holding title for security purposes only—and should in no event be allowed to recover more than the balance due on the contract as the value of the property.

In *Robins v. Welfare Finance Corporation* (Ga.), 96 SE 892, at p. 894, we find:

"We recognize the rules that . . . (b) as between the original purchaser and seller, the agreed price stated in a contract of sale is prima facie evidence of actual value, (Citation)."

Also in connection with the measure of damages in a replevin action where the plaintiff is a security holder or has title for security purposes as a special interest only in the property, *Frontier Motors v. Chick Norton Buick Company*, 279 P. 2d 1032, at p. 1035, states:

“In the Higgins case, *supra*, as here, the successful party had only a special interest in the property and we there laid down the formula now relied upon by defendants in order to do justice between the parties under the peculiar facts of that case. Fairly construed that decision stands for the proposition that in a replevin action a plaintiff having only a special interest in the goods in controversy cannot recover more than the amount of his special interest. In other words, the plaintiff is only entitled to be made whole.

* * *

“In the instant case it appears from evidence which is uncontradicted, that plaintiff’s special interest, i.e., the balance presently due on the contract including the costs of retaking and attorney’s fees as provided thereunder, far exceeds the value of the automobile. Under these circumstances—there being no privity of contract—plaintiff is entitled to recover the full value of the car in question, assessed at that value which it had at the time of trial.”

We submit that should the purported forfeiture be declared and found effective, that the true measure of damages in this case would be the unpaid

balance on the contract, less the 206 old ewes sold in the fall of 1956 shortly after Wickahoney Sheep Company took over the spread, and at the outside, the value of the lambs at the time of the purported taking in April, 1957, less the expenses of Wickahoney in producing, caring for and maintaining such lambs.

VI

CONCLUSION

For the reasons set forth herein, the judgment by the trial court should be reversed. Appellees' entire case is based on their possessory right to the personal property at the time of filing of the Complaint, which right of possession, in turn, is dependent on the effectiveness of the attempted forfeiture.

Since the Notice of Default did not comply with the forfeiture procedure specified in the controlling escrow agreement, and further since appellees were in substantial default in their failure to transfer to appellant Wickahoney Sheep Company, the designated Nit Creek acreage which was necessary to the sheep operation, such forfeiture was ineffective to terminate the agreement.

In addition, there being no proof to sustain the findings and judgment with respect to the value of the sheep, lambs and wool at the time of the taking, such judgment can be sustained on no basis but speculation and conjecture as to such values.

DATED at Boise, Idaho this 17th day of July,
1959.

Respectfully submitted,
HAWLEY & HAWLEY

By _____
Attorneys for Appellants
Eastman Building
Boise, Idaho

ELAM & BURKE

By _____
Attorneys for Appellant,
Bank of Idaho
Idaho Building
Boise, Idaho

IN THE
United States
Court of Appeals
For the Ninth Circuit

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and

BANK OF IDAHO (formerly Continental
State Bank), an Idaho corporation,

Appellant,

vs.

C. A. SEWELL, ORENE H. SEWELL,
and ORVILLE R. WILSON,

Appellees.

*Appeals from the United States District Court
for the District of Idaho.
Southern Division*

BRIEF FOR APPELLEES

LANGROISE & SULLIVAN
McCarty Building
Boise, Idaho
Attorneys for Appellees.

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LANGROISE & SULLIVAN
McCarty Building
Boise, Idaho

Attorneys for Appellees.



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I

INTRODUCTION

This is an action in claim and delivery brought by the appellees against appellant Wickahoney Sheep Company to recover back personal property sold under a conditional sales contract which was in default, or for the fair and reasonable market value thereof. Further, appellees sought the return of all documents escrowed under the Purchase Agreement, and the removal of a cloud on their title to the personal property.

By a supplemental complaint in this action appellees sought to recover from appellant Bank of Idaho monies paid to it which were derived from the sale of appellees' property.

Appellants' brief contains an adequate resume of the pleadings and proceedings in this action.

It is conceded that the action is between citizens of different states and that the matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00; thus original jurisdiction existed in the District Court of the United States for the District of Idaho on the grounds of diversity of citizenship under Title 28 USC 1332. Jurisdiction of this United States Court of Appeals to hear and determine the appeal is based upon 28 USC Sections 1291, 1294, 2107 and Rule 73 Federal Rules of Civil Procedure.

II

STATEMENT OF THE CASE

Appellees C. A. Sewell and Orene H. Sewell, as sellers, entered into a Purchase Agreement with appellant Wickahoney Sheep Company as purchaser on December 15, 1955, for the sale of certain personal property described in the agreement, which included 4,005 ewes, 82 bucks and other personal property. (Exhibit 18.) (R. 10-15.) The total purchase price to be paid by purchasers to sellers was \$121,700.00, payable \$15,000.00 down at the time of execution of the Purchase Agreement, and \$15,000.00 on October 10 every year thereafter, commencing on October 10, 1956, until paid in full. The unpaid balance of the

purchase price bore interest at the rate of five per cent per annum.

All of the personal property sold under the Purchase Agreement had been delivered to appellant Wickahoney Sheep Company on October 18, 1955, approximately two months prior to the execution of the agreement, and had been in the possession of appellant Wickahoney Sheep Company from the date of delivery. (R. 155, 167) In addition the President of Wickahoney Sheep Company testified that he had examined all of the property, including the sheep, prior to taking delivery. (R. 209, 210, 235)

The Purchase Agreement, Bills of Sale, and other documents were deposited with appellant Bank of Idaho at Boise, Idaho, as escrow holder, to be delivered to appellant Wickahoney Sheep Company only upon payment of the full purchase price with interest. In case of default and forfeiture the documents were to be returned to appellees. (Exhibit 19) (R. 27-32)

Thereafter the Sewells assigned this Purchase Agreement to appellee Orville R. Wilson (Exhibit 15). (R. 166)

It is uncontroverted that appellant Wickahoney Sheep Company made no payment to appellees after the original payment of \$15,000.00 on the execution of the agreement. Payment of \$15,000.00 due on October 10, 1956, or any part thereof, was never paid to appellees. (R. 150, 167) Likewise appellant Wickahoney Sheep Company permitted the band of sheep to become depleted and failed to maintain it

as required by the Purchase Agreement. (R. 159, 188)

The Purchase Agreement provided that in the event of default appellees should give written notice thereof by mailing it to appellant Wickahoney Sheep Company by certified mail, postage prepaid, return receipt requested. The agreement further provided that appellant Wickahoney Sheep Company should have ninety days after such written notice in which to remedy any defaults. Pursuant to these provisions of the agreement appellees mailed a notice of default (Exhibit 6) (R. 151) which was received by appellant Wickahoney Sheep Company on January 17, 1957 (Exhibit 8) and likewise a copy of said default notice was mailed to appellant Bank of Idaho and received by it on January 16, 1957 (Exhibit 7). Appellants do not deny nor controvert that this default notice was received by them. Nor do they in any way assert that the notice of default was not entirely adequate.

Appellant Wickahoney Sheep Company wholly failed, during said ninety day period, to make the \$15,000.00 payment due October 10, 1956, or any part thereof; nor has such payment ever been made. (R. 158) Likewise appellant Wickahoney Sheep Company failed to restore the band of sheep to its original number as required by the Purchase Agreement (R. 159) After the expiration of the ninety day period appellees declared a forfeiture of the Purchase Agreement and demanded possession of all of their personal property being sold under the Pur-

chase Agreement. Likewise appellees made demand upon appellant Bank of Idaho, as escrow holder, to turn over and deliver to them all documents held by it in escrow. (Exhibit 10) (R. 157, 184) This demand was refused.

Appellant Wickahoney Sheep Company refused to turn over to appellees said personal property or any part thereof. (R. 159, 167, 185) Not only did appellant Wickahoney Sheep Company in fact receive a proper notice of default, but its President testified that as early as July of 1956 he had received instructions to sell the sheep belonging to appellees, and that he knew at that time that there was no intention to make the payment due on October 10, 1956. (R. 237-239)

After the forfeiture of the Purchase Agreement and after the commencement of this action appellant Wickahoney Sheep Company sold lambs and sheep belonging to appellees, during the months of July and August of 1957, for the total sale price of \$86,082.50, without the consent of appellees. (Exhibit 13) (R. 80, 163, 164) Appellant Wickahoney Sheep Company had from time to time borrowed monies from appellant Bank of Idaho and as of January 5, 1957, the indebtedness was in the principal sum of \$100,000.00. (R. 74-75) The \$86,082.50 received by appellant Wickahoney Sheep Company from the sale of appellees' sheep and lambs was turned over by it to appellant Bank of Idaho to apply on the indebtedness. It is not controverted by appellants that the Bank of Idaho had full knowledge that these funds

were derived from the proceeds received from the sale of appellees' sheep and lambs. (Exhibit 14) (R. 76, 165)

It should be pointed out that after the notice of default was given appellant Wickahoney Sheep Company also sold wool and pelts derived from appellees' sheep and received wool and lamb subsidies. However, the trial court permitted the appellants to keep and retain all of these funds.

On October 9, 1957, on motion of appellant Wickahoney Sheep Company, the court appointed a receiver in this action who took possession of all of the assets of appellant Wickahoney Sheep Company. (R. 188, 190) This included all of the property being sold under the Purchase Agreement then remaining including 44 bucks, 100 small lambs and 3,187 ewes belonging to appellees (Exhibit 12). (R. 63-66, 160, 191) It thus appears that the band of sheep was short 818 ewes; however, the trial court did not award judgment to appellees for this shortage.

The receiver proceeded immediately to liquidate the personal property and the sale price which he received from the sale of appellees' property was \$62,370.18. (R. 104-108, 191)

The evidence shows that the fair and reasonable market value of appellees' property was the amount received from the sale thereof by appellant Wickahoney Sheep Company and the receiver. (R. 168-170, 191-192) Also that the value of a one and one-half ton 1954 International truck which was not delivered to the receiver was \$1,000.00. (R. 170-171)

During the course of this action appellant Bank of Idaho turned over to the Clerk of the Court all the escrow documents, and likewise the chattel mortgages on appellees' sheep (Exhibits 3, 4, 5, 21) and satisfactions thereof which had been given by appellant Wickahoney Sheep Company to appellant Bank of Idaho to secure its loans. (R. 52-54)

In the third defense and counterclaim appellants alleged fraud on the part of appellees Sewell. However, it appears from their brief that appellants have abandoned this defense, and properly so, as not one bit of evidence of fraud or misrepresentations was ever introduced.

The trial court made and entered its findings of fact and conclusions of law (R. 117-131). Thereupon judgment was entered in favor of appellees against appellant Wickahoney Sheep Company in the sum of \$149,452.68, being the fair and reasonable market value of appellees' property being sold under the Purchase Agreement, which this appellant had failed and refused to turn over and deliver to appellees. Likewise judgment was entered against appellant Bank of Idaho in the sum of \$86,082.50, being the amount of the monies received by it from appellant Wickahoney Sheep Company derived from the sale of appellees' sheep and lambs. The judgment further ordered the Clerk of the Court to pay to appellees the sum of \$54,655.04, being the balance turned over to the Clerk by the receiver after deduction of all receivership costs and expenses, same to be applied in satisfaction of the judgment against appellant

Wickahoney Sheep Company. Further the Clerk was ordered to deliver to the appellees the escrow documents and the chattel mortgages and the satisfaction thereof. (R. 131-133)

III

SUMMARY OF ARGUMENT

(A) The giving by appellees of the notice of default to appellants in the manner prescribed by the purchase agreement is sufficient to effect a forfeiture of the purchase agreement.

(B) The evidence establishes the valuation of appellees' property as awarded by the judgment of the trial court.

(C) Appellants had duly performed all of the conditions precedent of said purchase agreement required by them.

(D) Appellees are clearly entitled to the full amount of the judgment awarded them by the trial court.

IV

ARGUMENT

(A.) THE GIVING BY APPELLEES OF THE NOTICE OF DEFAULT TO APPELLANTS IN THE MANNER PRESCRIBED BY THE PURCHASE AGREEMENT IS SUFFICIENT TO EFFECT A FORFEITURE OF THE PURCHASE AGREEMENT.

The Purchase Agreement dated December 15, 1955, between appellees Charles A. Sewell and Orene H. Sewell as sellers and appellant Wickahoney Sheep Company as purchaser (Exhibit 18) which is the subject matter of this controversy, contains the following provisions:

“Time is of the essence of this agreement, and should Purchaser be in default in any of the terms or conditions of this agreement, Sellers shall give Purchaser notice of such claimed default in writing, addressed to Purchaser at 212 Continental Bank Building, Boise, Idaho, to be sent by registered or certified mail, postage prepaid, return receipt requested, and thereafter Purchaser shall have ninety (90) days within which to remedy the claimed default. Should the Purchaser fully perform those matters claimed to be in default as set out in said notice within said ninety-day period, no forfeiture may be declared or shall become effective. However, in the event that Purchaser fails to remedy the claimed default within the ninety-day period, Seller may claim a forfeiture of this agreement and shall have the right to retake possession of the personal property herein described, or its replacements, and the Sellers may retain all payments made hereunder as liquidated damages.”

Pursuant to these provisions appellees gave appellants written notice of default which was admittedly received by appellant Wickahoney Sheep Company

on January 17, 1957, and by appellant Bank of Idaho on January 16, 1957. There is no contention made by appellants that the notice of default was in any way inadequate nor do they deny that appellant Wickahoney Sheep Company was in fact in default under the terms of the Purchase Agreement as set forth in the notice of default. The following statement is made in appellants' brief at page 22:

"It is admitted, of course, in this case that the forfeiture provisions of the Purchase Agreement between the parties was complied with by the appellees."

The escrow agreement did provide that any notice of default should be furnished to the escrow holder and by it mailed to appellant Wickahoney Sheep Company, and further provided for a thirty day period in which to remedy the default.

The principal defense of appellants in this action is that no forfeiture of the Purchase Agreement was accomplished because the notice of default was given by the sellers directly to the purchaser, appellant Wickahoney Sheep Company, and to the escrow holder, appellant Bank of Idaho, and not channeled through the escrow holder.

By appellees complying with the provisions of the Purchase Agreement appellant Wickahoney Sheep Company was given a ninety day period in which to remedy the defaults. Had appellees given a thirty day notice as provided in the escrow agreement, then of course, appellants would now be claiming that

there was no forfeiture because the ninety days' notice was not given.

The escrow agreement provides merely that the "*Escrow holder* shall not be required to recognize service of notice given in any other manner." It does not state that the parties to the Purchase Agreement shall not be bound by a notice of default given in conformity to the requirements of the Purchase Agreement.

The escrow agreement itself is ambiguous and its terminology is awkward. It contains this provision: "It is further agreed that if any part of the escrow agreement and this agreement are in conflict, then the provisions of this agreement shall govern." Only two contracts are involved, to-wit: the Purchase Agreement and the escrow agreement. The above quoted paragraph refers to the escrow agreement and also to "this agreement." The escrow agreement is clearly specified and therefore the words "this agreement" can only refer to the Purchase Agreement. Consequently under this language, in case of conflict, the Purchase Agreement shall govern.

It is the general rule that the purpose of a notice requirement in a contract is to give the purchaser an opportunity to remedy any defaults that may exist. It is unquestioned that both appellants had notice of the defaults. Appellant Wickahoney Sheep Company was given ninety days to remedy the defaults, but did absolutely nothing.

Bintz Company vs. Mueggler, 65 Idaho 760, 154 P2d 513, (1944), was an action in claim and deliv-

ery to recover a machine sold by plaintiff under a conditional sales contract. The defense was breach of warranty. The contract provided that written notice must be given of any claimed breach of warranty within thirty days. This written notice was not given but the plaintiff did have actual knowledge of the claimed breach. The Court held for the defendant saying:

“The failure of the purchaser to give notice of defects or failure to do the work for which the machine was purchased, became unnecessary in this case, for the reason that it was admitted that the seller’s agent who installed the machinery, had notice of the defects and attempted to remedy them. As said by this court in *Harrison v. Russell & Co.*, 12 Ida. 624, 632, 87 P. 784:

“ “The only purpose of notice is to enable the vendor to examine the machinery and remedy any defects and put it in running order. When that purpose has been served and the company’s agents have taken charge of and examined and worked on the machinery, it becomes immaterial whether any notice at all has been given.” ”

In *J. I. Case Threshing Machine Company vs. Tate*, 70 Colo. 67, 197 P 764, (1921), the action was for breach of warranty and notice was not given as required by the contract. The Court said:

“The great weight of authority sustains the position that the purpose of notice is to enable the seller to remedy defects, if possible; and that when

experts have been sent out, and opportunity has been given them to make the necessary changes in the machine, or in its operation, the purpose of the requirement of notice has been served.”

The law is well established in Idaho that where a party to a contract claims that notice was not given in strict conformance to the terms of the agreement he must plead and prove that he was prejudiced thereby. In the very recent case of *Mowers vs. Holland Furnace Company*, . . . Idaho . . ., 339 P2d 663, (1959), the plaintiff entered into two written contracts to purchase a heating system and accessories from defendant. The contract provided that the buyer must notify seller in writing within a year for any claimed violation of the seller’s guarantee. Plaintiff sued to rescind the contract. The defense was that no written notice was given as required by the contract; however, the defendant did have knowledge that a violation was claimed. The Court held for the plaintiff and stated as follows:

“This Court has held that the failure to give notice such as is here involved is a matter of affirmative defense and that failure to give notice will not relieve the party of responsibility unless such party has been prejudiced by the violation. Both the fact of the failure to give notice and that prejudice resulted therefrom, are matters of affirmative defense which must be pleaded and proved by the aggrieved party.”

Quinn vs. Hartford Accident and Indemnity Com-

pany, 71 Idaho 449, 232 P2d 965, (1951) was an action to recover on a contractor's bond. The bond contained the following provision :

“Provided, however, it shall be a condition precedent to any right of recovery hereunder that, in the event of any default on the part of the Principal, a written statement of the particular facts showing the date and nature of such default shall be immediately given by the Obligee to the Surety and be forwarded by registered mail to the Surety at its Home office in the City of Hartford, Connecticut.”

The defendant had actual notice of the defaults of the contractor but no written notice was given as required by the contract. The Court held that the failure to give the written notice was not a defense where it did not appear from the evidence that the defendant was in any way prejudiced in its rights by such failure.

See also:

Leach vs. Farmers Automobile Inter-Insurance
Exchange, 70 Idaho 156, 213 P2d 920 (1950).
Olson Brothers vs. Hurd, 20 Idaho 47, 116 P
358, (1911).

The answer of appellants makes no claim of any kind that either of them were in any way prejudiced because the notice of default was given directly to appellant Wickahoney Sheep Company instead of passing through the Bank. Nor is there the slightest bit of evidence in the record that any such prejudice

resulted. Indeed, appellants, in their brief make no claim whatsoever that they were prejudiced in any way or suffered any injury or even inconvenience.

Appellees submit that appellants have cited no authorities whatsoever to support their contention that there was no forfeiture of the contract because of the manner in which the notice of default was given. One group of appellants' cases are concerned with a total lack of notice of default, or where the notice itself was materially defective. In the case at bar the written notice of default was admittedly given and received and its sufficiency is unquestioned.

The other group of appellants' cases deal with actions against an escrow holder for breach of its obligations as such. This action does not in any way attempt to impose any liability on the escrow holder. Obviously from its terms, the purpose of the escrow agreement is to define the obligations of the escrow holder and to limit its liability. Appellees seek no damages whatsoever against the Bank of Idaho as escrow holder. Appellant Bank of Idaho is a party to this action under the supplemental complaint for knowingly and willfully receiving funds belonging to appellees and applying them on the indebtedness of appellant Wickahoney Sheep Company. Such actions of appellant Bank of Idaho do not involve its status as the escrow holder.

Appellees gave the notice of default in exact conformity to the requirements of the Purchase Agreement to both appellants and gave the full ninety-day period in which to remedy the admitted defaults,

which is more than adequate to accomplish a forfeiture of the Purchase Agreement.

(B.) THE EVIDENCE ESTABLISHES THE VALUATION OF APPELLEES' PROPERTY AS AWARDED BY THE JUDGMENT OF THE TRIAL COURT.

After the Purchase Agreement was forfeited because of the admitted defaults of appellant Wickahoney Sheep Company, the latter failed and refused to deliver to appellees their property. Instead it retained possession and in July and August of 1957 sold a large number of appellees' sheep and lambs for the total purchase price of \$86,082.50. The evidence is uncontradicted that this purchase price was the fair and reasonable value of the sheep and lambs.

On petition of appellant Wickahoney Sheep Company a receiver was appointed by the court in this action. He took possession of all of the property then in the possession of appellant Wickahoney Sheep Company on October 9, 1957, and proceeded immediately to sell the balance of the sheep and other personal property. The receiver received the sum of \$62,370.18 from the sale of the property of appellees, and the evidence is uncontradicted that this was the fair and reasonable market value of appellees' property.

It is true that the Idaho Court has stated that in an action of claim and delivery the general rule in Idaho is that the property is to be valued as of the time of the taking. However, none of the cases cited in appellants' brief were concerned with the peculiar

factual situation existing in the case at bar.

Not only did appellant Wickahoney Sheep Company wrongfully refuse to deliver appellees' property to them, but after this action was commenced and service had upon appellants, appellant Wickahoney Sheep Company proceeded to sell a large number of appellees' lambs and sheep. Where property is of a fluctuating value, and particularly where the wrongdoer sells another's property there is an exception to the general rule as to the time when the value shall be established. In 46 Am. Jur. Replevin, Section 148, the rule is stated as follows:

“Time as of Which Value is Estimated.—The general rule in replevin is that the damages will be the value of the property at the time of taking, with interest from that time, but a number of well-reasoned cases support the rule that the value to be assessed is the value at the time of the trial. *In the case of property having a fluctuating market value, there is authority to the effect that the successful party will be allowed the highest price intermediate the taking and the trial, if the suit was commenced within a reasonable time, and prosecuted without unnecessary delay.*” (Emphasis ours.)

Again it is stated in 77 C.J.S. Replevin, Section 270, as follows:

“Property which fluctuates in value. In some cases it has apparently been recognized that, in determining the time as of which property which

fluctuates in value should be valued for the purpose of a recovery by the prevailing party in replevin, the circumstances may call for the application of a rule other than that which might be applicable with respect to other property. The view has been expressed that the form of action is not material in determining the question, and that rules similar to rules applicable in trover in this regard apply. The general principle is that the prevailing party must be adequately compensated, and that the wrongdoer shall not profit by his wrong. So it has been held that, where it has not been shown that the prevailing party who has, under a statute, elected to take the value of the property is deprived of a higher value than he would have profited by had he retained possession and further, it is not shown that the wrongdoer profited by the higher immediate value, the prevailing party will not be entitled to the highest price available between the time of the wrongful detention and before the entry of judgment. *On the other hand, it seems that an intermediate higher value may be allowed where the enhanced price has been realized by the wrongdoer, or it is reasonable to be believed and closely probable that the owner would have realized it had he retained possession.* It has been held that this higher value in such a case should be the highest market value within a reasonable time after the property is taken, and not the highest value at any time after the taking." (Emphasis ours.)

Three States Lumber Company vs. Blanks, 133 F. 479 (CCA 6), (1904), was an action of replevin wherein the plaintiffs took possession of a quantity of lumber. Thereafter, in another action, the plaintiff caused the lumber to be sold for salvage. In the replevin action it was determined that the plaintiff had no right to the lumber and judgment was for the defendant for its value. In considering the determination of value the court said:

“The judgment below was for the value of the lumber at the time it was taken, with interest. That much was in strict accordance with Section 5144, Shannon’s Code Tenn., as construed in *Mayberry v. Cliffe*, 7 Cold. 117. The jury also found, upon evidence, that there had been a rise in the value, and they accordingly assessed the difference between the value when seized and the value at date of trial as damages for detention. This, too, is in accord with the construction placed on the act by the case cited above.”

Plaintiff sought the delivery of a truck and trailer or its reasonable value in *Miller vs. Wantland*, 143 Pac. (2d) 807 (Okla.) (1943), and recovered judgment therein. The Court stated that the general rule in Oklahoma is that property shall be evaluated in a replevin action at the time of the taking. However, the Court said that where the property was sold eighteen days after it had been purchased and delivered to plaintiff, and the testimony did not show a decreased value in the meantime, that the purchase

price was sufficient evidence to justify the determination of value as of the time of the taking.

In *Page vs. Fowler*, 39 Cal. 412, 2 Am. Rep. 462 (1870), plaintiff took possession of a crop of hay in a replevin action commenced in 1863 and subsequently sold it. Judgment was for the defendant and in determining the value of the hay to which the defendant would be entitled the jury assessed damages at \$25,763.23. At the time the property was taken it was not worth more than \$2,500.00. The basis of the verdict was evidence that in 1864, a year of great scarcity, the value of hay had tremendously increased.

The Court reversed the judgment of the trial court based upon the verdict, saying that valuation based on values a year later in a very unusual situation was unreasonable. However, the Court stated that although the general rule is that damages are to be measured by the value of the property at the time it was taken, there is an exception in cases involving property of a fluctuating value. And therein the correct measure of damages is the highest market value within a reasonable time after the property was taken.

Barnard vs. Corlett, 161 Pac. 156 (Colo.) (1916), was an action of replevin for hay. The defendant gave a redelivery bond and retained possession.

Subsequently, and during the litigation the defendant fed the hay to his stock. Judgment for the plaintiff for the value of the hay at the time the defendant fed it. The Appellant Court affirmed the

judgment and stated that although the general rule in Colorado is that in a replevin action the property is evaluated as of the time of the taking, under the circumstances of this case it was proper to determine the value as of the time the defendant fed the hay to his stock.

See also *Maier vs. Henson Motor Co.*, 151 S.W. (2d) 452 (Mo.) (1941).

Thus it appears that in the case at bar the circumstances call for the application of the exception to the general rule. Had appellant Wickahoney Sheep Company returned the property to appellees after the forfeiture was declared, as it was lawfully bound to do, then the appellees could have sold the lambs at the usual market time which commenced the first of July, 1957, and would have realized from such sale the same price as did appellant Wickahoney Sheep Company. Consequently the price received by Wickahoney is a proper determination of value and is the correct amount to be awarded appellees in the judgment against the appellants. Otherwise the appellants would be permitted to profit by their own wrongful acts. It would be highly unjust and inequitable to permit them to wrongfully retain possession, unlawfully sell the property during the course of litigation, and then claim that they are entitled to any profits they might have realized because of enhancement of value.

As to the sales made by the receiver appointed at the request of appellant Wickahoney Sheep Company, an even stronger situation prevails. When the

receiver took possession he was acting as an officer of the Court and the property was then in custodia legis. The judgment of the Court was that at that time the property was in fact owned by appellees and that they were entitled to the possession thereof. Therefore, when the receiver sold appellees' property, under order of the Court, the proceeds of such sales belong to appellees.

This rule is well explained in 77 C.J.S. Replevin Section 270, as follows:

"Where property not available at trial. Where at the time of the trial the property has been lost or destroyed, the rule that the value is to be assessed as of the time of the trial has been regarded as inapplicable, and in such case the value is measured as of the time of the wrongful taking or detention. *Where the property has been sold before trial by order of court, it has been held that the value is to be measured as of the date of the sale.*" (Emphasis ours.)

To the same effect is *Huntington vs. Jamieson*, 50 S. W. (2d) 705 (Mo.) (1932). That was an action of replevin and the sheriff took possession of the property about November 9, 1929. Subsequently, on July 26, 1930, the sheriff sold the property under order of court at a public sale for \$274.55. Defendant testified the property was worth \$1,000.00. The verdict was for the defendant for \$750.00. The Appellate court reversed saying that the general rule in Missouri is that value of property is assessed as of

date of trial; however, where the property has been disposed of under order of court the value of property must be assessed as of the time of sale. The Court also stated that the same rule would apply to property where voluntarily sold by the wrongdoer.

Thus if the property sold by the receiver under order of court was owned by appellees, it is clear that they are entitled to the full proceeds received from their sale. And it was so determined by the trial court.

(C.) APPELLEES HAD DULY PERFORMED ALL OF THE CONDITIONS PRECEDENT OF SAID PURCHASE AGREEMENT REQUIRED OF THEM.

On December 15, 1955, appellees Sewell and appellant Wickahoney Sheep Company entered into the purchase contract for the sale of sheep and other personal property, which is the subject matter of this action (Exhibit 18). This contract was complete in and of itself, and was not related to any other agreement.

On the same date appellees Sewell also entered into a lease agreement, leasing real estate to appellant Wickahoney Sheep Company (Exhibit 17).

Previously, and on October 18, 1955, appellees Sewell and appellant Wickahoney Sheep Company entered into a memorandum agreement (Exhibit 23), which referred to another contract also dated October 18, 1955, which contract has been completely superseded.

The lease agreement was shortly thereafter assigned by Wickahoney Sheep Company to the Ruby Company, a wholly separate and independent corporation, which is not a party to this action. The Wickahoney Sheep Company did not retain or reserve, and does not now have, any rights or interest whatsoever in said lease agreement.

There is no relationship whatsoever between the purchase agreement for the sale of personal property on which this suit is based, and the lease agreement or the memorandum agreement. They are not connected nor interrelated in any way. However, appellants now contend that appellees have failed to perform all of the conditions of the memorandum agreement, and for that reason are now in default under the terms of the purchase agreement.

It should be pointed out that appellants did not plead the defense of breach of contract on the part of appellees, nor was this defense ever raised during the trial. Appellants pleaded a defense of fraud and misrepresentation, and it was on that theory that the case was tried. After the trial the following colloquy occurred between the court and the attorney for appellants concerning the theory of their defense (R. 264) :

“The Court: Assuming that that is true, does that give you a basis for an action for fraud and misrepresentation, or breach of contract?

Mr. Hawley: I think fraud and misrepresentation.”

Thus, this defense of failure on the part of appellees to perform the requirements of the purchase agreement is raised for the first time on this appeal.

In any event, the record shows that appellees were not in default under the provisions of the memorandum agreement (Exhibit 23). The 800 A.U.M.'s were in fact transferred by Sewell to appellant Wickahoney Sheep Company, and were attached to the Coig property which was under lease. (R. 233, 234 and 260.) Likewise, appellant Wickahoney Sheep Company had the use of the Nit Creek range and property during all of the period in question (R. 236-242). Harley McDowell fixed the value of the 800 A.U.M.'s and the Nit Creek property in excess of \$11,000.00. However, Wickahoney Sheep Company never paid appellees anything for the 800 A.U.M.'s nor the use of the Nit Creek property (R. 237). Lloyd Haight prepared a proposed lease agreement and option agreement (Exhibits 28 and 29), and sent them to Orville Wilson, attorney for the Sewells in the latter part of September, 1956 (R. 250). On October 5, 1956, Orville Wilson wrote to Haight, acknowledging receipt of these documents (R. 251) (Exhibit 30). In this letter Orville Wilson pointed out several defects in these instruments. He also stated to Haight that he did not think there were any insurmountable difficulties, and if they could confer on them the agreements could be worked out. However, neither Haight nor appellant Wickahoney Sheep Company ever did anything further in this matter. Consequently, there can be no assertion by

appellants that appellees were in default even under the terms of the separate and independent memorandum agreement.

The case of *Huggins vs. Green Top Dairy Farms, Inc.*, 75 Idaho 436, 273 Pac. (2d) 399, relied upon by appellants, does not sustain their position. The court in that case found that the defendant was not in default because it had tendered complete performance during the grace period, and also that the plaintiffs were in fact in default in several material particulars under the terms of the agreement which was the basis of that suit. Therefore, no forfeiture was allowed. That case is certainly no authority for the contention that because appellees are claimed to be in default under a wholly separate and independent agreement they are not permitted to forfeit the purchase agreement, whose provisions it is admitted they have fully complied with.

Likewise, the case of *Giffen vs. Faulkner*, 50 Idaho 190, 294 Pac. 521, gives appellants no assistance, because there appellants were greatly in material default under the terms of the very agreement which was the subject of the action.

Appellees submit that where they have fully performed all the requirements of the purchase agreement which is the basis of this action, that it is no defense for appellants to assert that they were in default under the requirements of the wholly separate, independent and unrelated contract. And, in addition, the facts clearly show they were not in fact in default even under the terms of the separate mem-

orandum agreement.

(D.) APPELLEES ARE CLEARLY ENTITLED TO THE FULL AMOUNT OF THE JUDGMENT AWARDED THEM BY THE TRIAL COURT.

The appellants assert that they should be entitled to an offset for their reasonable expense in the care and maintenance of the sheep, and the expenses of the operation of appellant Wickahoney Sheep Company.

The obvious answer to this contention is that appellants made no claim in their answer or counterclaim for any such offset, nor is there the slightest bit of evidence as to what these expenses were, nor whether or not they were reasonable. Appellants do not even set forth in their Brief the period of time for which they think they are entitled to such an allowance. Certainly such an award cannot be made in the absence of proof, nor were appellees afforded any opportunity to counteract any possible showing of the reasonableness of such expense.

It appears from the authorities that in an action of claim and delivery to entitle the defendant to an offset for expenses in keeping the property certain essential elements must be present which are clearly absent in this case.

First, any such award must be supported by pleadings and proof, which is not done here as pointed out above. (46 Am. Jur., Replevin, Sections 142-143.) Secondly, the property must actually have a value for use, such as horses, farm implements, tools of trade, etc. Sheep have no value for use, but only

for sale or consumption, in which case the recovery must be of the goods or for value. (46 Am. Jur., Replevin, Sections 145-156.)

Thirdly, the detention of the property must have been in good faith. It is rather astonishing that these appellants should now assert that their detention of appellees' property was in good faith. Appellant Wickahoney Sheep Company had determined as early as July, 1956, that it was not going to make the payment due October 10, 1956, and that in addition to this deliberate intent to default on the contract it planned also at that time to start selling off appellees' sheep (R. 238-239). The breach of the purchase agreement by appellant Wickahoney Sheep Company was not an accidental oversight, but was intentionally planned, and in spite of that after the notice of default was given it still refused to perform throughout the ninety-day notice period, and then upon forfeiture of the purchase agreement by appellees flatly refused to return their property to them. And then after this action was instituted appellant Wickahoney Sheep Company continued to sell off appellees' sheep and lambs. In spite of all these activities appellants base their contention that they acted in good faith on the flimsy excuse that there was no forfeiture because the notice of default did not pass through the escrow holder.

The subject case is in this respect entirely different from the case of *State vs. Shevlin-Carpenter Co.* (1895), 64 N.W. 81 (Minn.), which is cited by appellants on page 42 of their Brief. The latter case

involved the processing and marketing of state owned timber under a permit which had actually been issued by the state but was later construed as invalid. Thus, the taking was in good faith, and the amount of the costs of the processing and sale were pleaded and proved by the defendant.

The case cited by appellants on page 43 of their Brief, *Guerin vs. Kirst*, 202 P. 2d 10 (Cal.) (1949), 7 A.L.R. 2d 922, involved the conditional sale of a tractor which actually had allowable value for use, the claimant was the owner, and the defendant was an innocent purchaser from the conditional vendees. Both the award of damages for use and the offset for costs of maintenance were pleaded and proved. Thus, the latter case has all the elements lacked by the subject case, that is, the property in controversy actually had value for use, the plaintiff had the right to the use, good faith of the defendant, and both the value for use as damages and the cost of the maintenance of the tractor as an offset were pleaded and proved.

The decision of the court in *Cunningham vs. Stoner*, 10 Idaho 549, 79 P. 228 (1904), at page 560, contains language which indicates that wool (but not lambs) might be usable value of sheep against which there might be an offset for the costs directly attributable to the usable values, that is, the cost of shearing and marketing to the date of judgment, provided the sheep were being held in good faith. But no allowance should also be made for the cost of keeping the sheep. To do so, in fact, would be to imply a con-

tract directly contrary to the will of the owner.

The appellants state in their Brief, page 41, that the judgment awarded to appellees in this action was "an unconscionable recovery." Also, they make the statement that the judgment awarded appellees the proceeds from sale of wool. In this they are clearly in error. The trial court permitted the appellants to retain all proceeds received by them from the sale of wool, pelts and lamb subsidies made after the notice of default was given, and even after the forfeiture of the agreement. This sum which appellants were permitted to keep amounted to the sum of \$31,-869.80. (R. 80.)

Also, the purchase agreement provided that appellant Wickahoney Sheep Company must maintain the band of sheep, which at the time of sale consisted of 4,005 ewes. At the time the property was turned over to the receiver the band of sheep was short 818 ewes, which under the contract Wickahoney Sheep Company was required to replace. The reasonable value of replacing these missing ewes is \$19,632.00 (R. 162, 194). However, the judgment did not award appellees this sum for replacements. Thus, it would appear that as far as equities are concerned the appellants were very well treated by the trial court.

Appellants contend this was merely a security transaction. Consequently, appellees should be limited in their recovery to the balance due on their contract. It is noteworthy that appellants say nothing about the interest of 5% per annum required to be

paid under the purchase agreement for a period of three and one-half years, which was never paid. However, this is an action for claim and delivery, and under the terms of the purchase agreement appellees were entitled, upon forfeiture, to recover possession of their property, or its value in case delivery cannot be had.

Idaho Code 10-1104

Largilliere Co., Bankers v. Kunz, 41 Idaho 767,
244 Pac. 404

Tannahill v. Lydon, 31 Idaho 608, 173 P. 1146

Bates v. Capital State Bank, 21 Idaho 141, 121
P. 561

Oakes v. Lake, 290 U.S. 59, 78 L. ed. 168

By the terms of the contract itself, however, no title passed until the contract was performed, and in the event of a default by the appellant Wickahoney Sheep Company the appellees had but one remedy; that is, to retake the property. There were no innocent third parties involved. There was no provision for the survival of any debt in the event the value of the property was less than the amounts due by virtue of the contract, and no provision for acceleration of the payments in the event of a default.

Once the agreement was forfeited there was no debt to be secured, and the appellant Wickahoney Sheep Company had lost any right it may have had ultimately to obligate the appellees to convey title to the sheep.

Clearly, this was nothing more than an executory contract for the sale of property, and not in any

sense a mortgage or lien either at the time the agreement was made or at the time of the filing of this action. Consequently, the principles of damages which relate to security transactions would have no application to this action without injecting into the agreement an entirely new provision which obviously the parties never intended.

Appellants cite certain cases on pages 45 and 46 of their Brief in support of the principle limiting recovery in security transactions to the amount of the indebtedness.

Each one of these cases was a true security transaction, with an indebtedness on the part of the vendee aside from and not necessarily equivalent to the value of the property which was being replevined. In *Road Equipment & Material Co., Inc. vs. McGowan*, 91 So. 2d 554 (Miss.) (1956), the court simply held that the plaintiff could not join an action for replevin of a dragline machine with an action for debt on the installment notes given with the conditional sales contract, and held the personal judgment on the installment notes void.

In *Creighton vs. Haythorn*, 68 N.W. 934, (Neb.) (1896), the claimant had no right of ownership or title in the livestock. All he had was a lien for damages incurred when the livestock trespassed on his property. This case also held that damages for the unlawful detention of property cannot be awarded without pleading and proof of the value of possession.

Hickman-Williams Agency vs. Haney, 40 N.W.

2d 813 (Neb.) (1950), involved controversies as to the disposition of the proceeds of the sale of an automobile between the holder of a chattel mortgage and negotiable note and the holder of an artisan's lien, both of whom had participated in the sale of the automobile to an innocent third person.

In *Robbins vs. Welfare Finance Corporation*, 96 S.E. 2d 892 (Georgia) (1957), money had been borrowed to pay off prior loans, secured by a promissory note and bill of sale for a chattel. The court held that the amount of the indebtedness did not determine the value of the chattel because there was no sale involved, and reversed the judgment of the lower court for failure of proof of value and demand and refusal prior to suit.

Frontier Motors vs. Chick Norton Buick Co., 279 P. 2d. 1032 (Ariz.) (1955), involved a conditional sales contract which provided for specific monthly payments and for the acceleration thereof and possession of the automobile in the event of default in payment. The parties to the action were the seller and an innocent third party who had paid value for the automobile, and who had no privity of contract with the seller.

In each of the cases cited above there was a true special interest securing an indebtedness aside from the value of the property, which indebtedness could be asserted in a separate action against the defendant or another party. Any judgment exceeding the value of the property would have been in the nature of a personal judgment for debt which the court

could not enter either because a replevin action could not be joined with an action for debt or because there was no privity of contract. On the other hand, in the instant action there was no indebtedness to be claimed and the appellees demanded only the return of their own property, or its value. Consequently, the value of the property was the only possible measure of recovery where the property could not be returned.

V

CONCLUSION

For their defense to this action appellants place chief reliance on the fact that the notice of default was given directly to each of the appellants instead of being transmitted through the escrow holder. In the giving of the notice appellees fully complied with the provisions of the purchase agreement, and appellants do not even attempt to assert that any prejudice resulted to them.

Appellees are clearly entitled to the full amount of the judgment awarded to them by the District Court. Upon the forfeiture of the agreement they were entitled to the possession of all their property and, therefore, they obviously are entitled to receive the proceeds of the sales of their property wrongfully made by appellant Wickahoney Sheep Company, and also the proceeds of the receiver's sales of their property made under order of Court.

Appellants admit that appellees fully performed all the provisions of the purchase agreement required

to be performed by them. Likewise, the evidence shows that they likewise performed the requirements of the memorandum agreement. However, even if they had not, the latter is a wholly separate and independent contract, and any breach thereof cannot affect appellees' rights under the purchase agreement which is the basis of this action.

Nor are appellants entitled to an offset for any expenses they might have incurred in keeping the sheep, for on this point there is a complete failure of pleading and proof.

Appellees submit that the judgment of the District Court should be affirmed.

LANGROISE & SULLIVAN

By 

Attorneys for Appellees

400 McCarty Building

Boise, Idaho

No. 16392 ✓

United States
Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

VS.

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL UNION
No. 11, AFL-CIO,

Appellee.

Transcript of Record

**Petition to Enforce an Order of the
National Labor Relations Board**

FILED

JUL 23 1959

PAUL P. O'BRIEN, CLERK



No. 16392

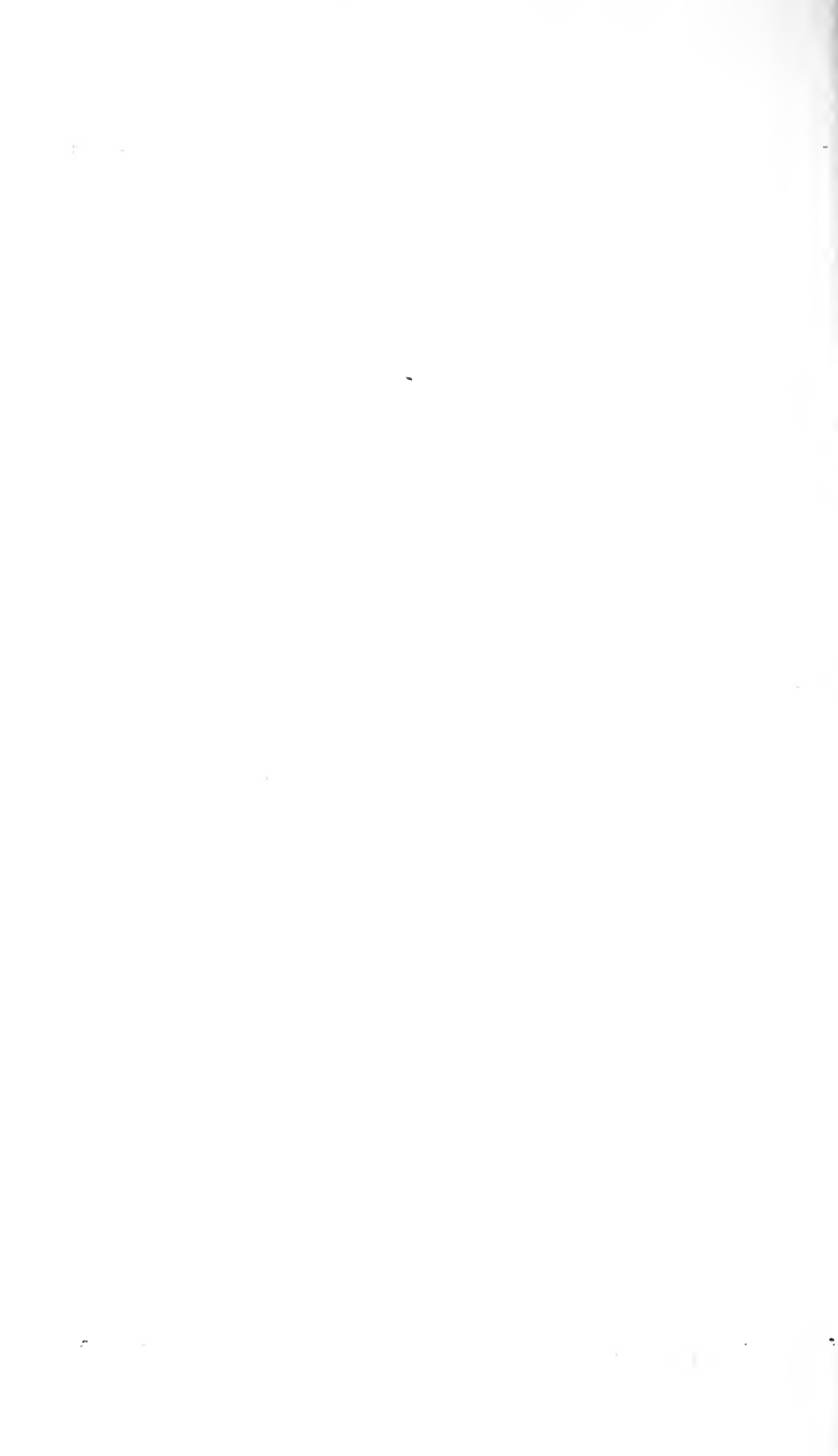
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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APPEARANCES

THOMAS J. McDERMOTT,

Assoc. General Counsel,

MARCEL MALLET-PREVOST,

Asst. General Counsel,

National Labor Relations Board,

Washington 25, D.C.,

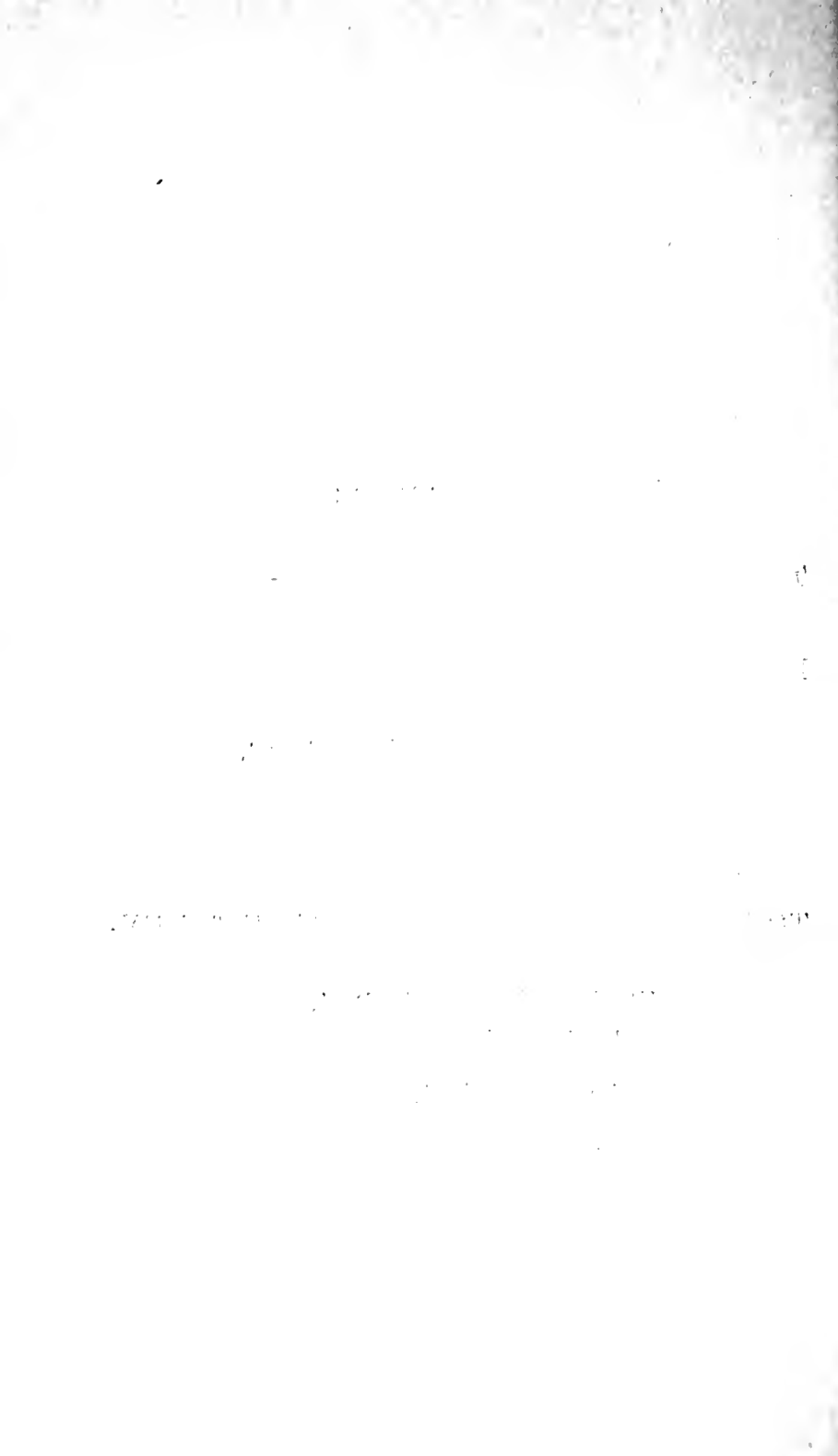
For the Petitioner.

TOBRINER, LAZARUS, BRUNDAGE & NEY-
HART,

3540 Wilshire Blvd., Suite 1211,

Los Angeles 5, Calif.,

For the Respondent.



United States of America
Before the National Labor Relations Board
Division of Trial Examiners
Branch Office
San Francisco, California
Case No. 21-CC-281
Case No. 21-CC-282

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL UNION
No. 11, AFL-CIO,

and

ROBERT B. McCLARY AND BURT A. LOWE,
JR., d/b/a HYDRO COMPANY

and

PAUL GARDNER, ELECTRICAL CONTRAC-
TOR

PAUL E. WEIL, ESQ.,

For the General Counsel.

TOBRINER, LAZARUS, BRUNDAGE & NYE-
HART, by

ALBERT BRUNDAGE, ESQ.,

Of Los Angeles, Calif.,

For the Respondent.

JACK E. HILDRETH, ESQ.,

Of Los Angeles, Calif.,

For Hydro.

Before: Wallace E. Royster, Trial Examiner.

**INTERMEDIATE REPORT AND
RECOMMENDED ORDER****Statement of the Case**

Upon charges filed by Robert B. McClary and Burt A. Lowe, Jr., d/b/a Hydro Company, herein called Hydro, and by Paul R. Gardner, the General Counsel of the National Labor Relations Board issued an order consolidating the cases for hearing and a complaint dated December 17, 1957, against International Brotherhood of Electrical Workers, Local Union No. 11, AFL-CIO, herein called the Respondent, alleging that the Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8 (b) (4) (A) and Section 2 (6) and (7) of the National Labor Relations Act, 61 Stat. 136, herein called the Act.

In respect to unfair labor practices the complaint alleges in substance that on and since November 12, 1957, at one location, and on and since November 18, 1957, at another, the Respondent has picketed certain access roads leading to projects where employees of Paul Gardner Corporation were employed to induce and encourage employees of other employers to engage in strikes or concerted refusals in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on goods, articles, materials, or commodities or to perform services with an object to force or require the State of California and other

employers and persons to cease doing business with Paul Gardner Corporation.

Respondent's answer denies the commission of unfair labor practices.

Pursuant to notice a hearing was held in Los Angeles, California, on January 27 and 28, 1958, before the undersigned Trial Examiner. All parties were represented and were permitted to examine and cross-examine witnesses and to introduce evidence pertinent to the issues. A brief has been received from counsel for the Respondent.

Upon the entire record in the case and from my observation of the witnesses, I make the following:

Findings of Fact

I. The businesses of the employers affected

Paul Gardner Corporation, a California corporation, is a successor to Paul Gardner, a sole proprietorship, and is engaged in electrical contracting. Its principal office and place of business is located in Ontario, California. During the year preceding November 6, 1957, Paul Gardner has performed services and supplied materials valued in excess of \$100,000 for and to companies engaged in interstate commerce, for and to public utilities, and for and to the State of California in the construction of interstate highways and essential links to such highways.

Hydro is a partnership doing business in California as a plumbing contractor.

I find that Paul Gardner Corporation is now and Paul Gardner, a sole proprietorship, at all times material herein has been, engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.¹

II. The labor organization involved

The Respondent is a labor organization existing for the purpose of representing employees in relation to wages, hours, and conditions of employment, and during the period of interest here was attempting to persuade employees of Paul Gardner or the Paul Gardner Corporation to become its members.

¹In the year preceding November 6, 1957, Paul Gardner, as an individual, performed work for the State of California Highway Department having a value of approximately \$68,000; did work for the General Electric Company having a value of in excess of \$13,000; did work for Pasadena Municipal Light & Power Company having a value in excess of \$9,000; and did work for Upland Lemon Growers Association, Cucamonga Mesa Growers Association, and Orange Heights Orange Association having a value in excess of \$16,000. The work for the Highway Department was on roads used for the interstate transportation of goods and products. The citrus associations and General Electric Company each shipped annually goods and products having a value of more than \$50,000. The Pasadena Municipal Power & Light Company has annual gross billings in excess of \$6,000,000. Contrary to the contention of counsel for the Respondent, I find these facts to satisfy the Board's criteria for the assertion of jurisdiction. See *White's Uvalde Mines*, 117 NLRB 1128, 1138.

III. The unfair labor practices

About October 1, 1957, Paul Gardner began work on a contract with the State of California to make **certain** electrical installations on the campus and perhaps in the buildings of California State Polytechnic College. Gardner employees were not represented by any labor organization. The work at the college consisted in part of laying conduit in a ditch which had been dug by employees of Hydro and in which Hydro employees were placing water lines. On October 18 a picket was placed by the Respondent on a road at a point of intersection with the ditch bearing a picket sign reading: "To employees: Paul Gardner Electric Company is non-union. Join LU 11-IBEW-AFL-CIO. This is an organizational picket line." The point of picketing was sometimes in view of Gardner employees and sometimes not, depending upon the location of their work along the ditch. This same circumstance applied to the Hydro employees. Robert McClary, a partner in Hydro, testified that he was unable to get his employees to perform work in the ditch at any point from which the picket was visible.

On October 23 McClary discussed the problem of getting his employees to work near the picket with a representative of a plumbers union in the presence of Leroy Devereaux, business representative of the Respondent. McClary testified that on this occasion he asked if he could have his employees work after hours or on weekends when the

picket would not be present. Devereaux answered that it was a 24-hour picket line.² On the same occasion Devereaux disclaimed any intention to cause Hydro employees to refuse to work and explained that he was merely trying to organize Paul Gardner employees. On at least three occasions in late October and early November, Gardner employees were not at work on the college project but the picket appeared nonetheless. On November 18 the Respondent removed the picket from the point near the ditch and placed a picket at each of the two principal entrances to the college campus. Devereaux explained that Gardner employees had moved to another area on the campus and the access roads picketed on November 18 were as close to their working place as possible. Many of the employees of other contractors refused to pass the pickets and did not return to work until the pickets were removed on November 21.

On November 12, the Respondent placed a picket at the principal employee entrance of Metropolitan State Hospital in Norwalk, California, where another group of Gardner employees was working. At the appearance of the picket, employees of other employers doing work on the hospital project, including those of Robert E. McKee, the general

²According to Devereaux he meant no more than that the picket would appear whenever Gardner employees did. In the context of the conversation, however, it would seem to be a statement of intention to encourage Hydro employees not to work in the ditch.

contractor, refused to enter the grounds and remained away from work until picket was withdrawn a week or 10 days later.

All employees of Paul Gardner and of the successor Paul Gardner Corporation report for work at their employer's shop in Ontario, California, before 8:00 each morning and return there in the late afternoon from whatever project they have been working on. The General Counsel argues that inasmuch at the Respondent could place pickets at Gardner's place of business and there carry any message it desired to the employees it was trying to organize, that the appearance of pickets on the college and the hospital project where employees of other employers could be and were influenced to refuse to work, constitutes a violation of Section 8 (b) (4) (A) of the Act precisely as found by the Board in the Washington Coca Cola case.³ There the Board said, "The broad argument that picketing is aimed only at publicizing a labor dispute and not at inducing work stoppages by employees who are required in their regular employment to cross the picket lines has been too often rejected to require further elaboration here." I am convinced that the Board's holding in the Washington Coca Cola case is dispositive of the case at hand. Had the Respondent only a purpose to publicize to

³Brewery and Beverage Drivers and Workers, Local No. 67, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, 107 NLRB 299.

Gardner employees the fact that the Respondent was willing and able to represent them in matters of collective bargaining and was the Respondent concerned only to persuade these workers to become its members, it seems obvious that picketing would have taken place at the Gardner shop where these employees could surely be reached twice each day. But no picket appeared there. The device of placing a picket near the ditch on the college project where he and his sign would be visible to Gardner employees only upon occasion and later at entrances to the college project and to the hospital project where it was certain that employees other than those of Gardner would see the picket and his sign, leads me to the conclusion that an object of the picketing was to advertise to employees other than those of Gardner that Gardner men were not members of a labor organization and thus to encourage these other employees to refuse to work where the Gardner men were employed.⁴ I find that by the picketing at the college project on and after November

⁴“This conclusion rests on the sound premise that a union which can direct its inducements to the primary employer’s employees at the primary employer’s premises, does not seek to accomplish any more with respect to the same employees by directing the same inducements to those same employees at the premises of some other employer. Consequently, the only reasonable inference in such a situation is that inducements which are ostensibly directed at the primary employer’s employees are in fact directed at the employees of the secondary employers.” *International Brotherhood of Teamsters etc.*, 115 NLRB 981, 984.

18⁵ and at the hospital project on and after November 12, the Respondent induced and encouraged employees of secondary employers to cease performing services for their respective employers, an object thereof being to cause the State of California and the other employers to cease doing business with Paul Gardner Corporation. I further find that by such conduct the Respondent has engaged in unfair labor practices within the meaning of Section 8 (b) (4) (A) of the act.

IV. The effect of the unfair labor practices upon commerce

The activities of the Respondent set forth above, occurring in connection with the operations of the various employers described in Section I above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The remedy

Having found that the Respondent has engaged in unfair labor practices, it will be recommended that it cease and desist therefrom and take affirmative action designed to effectuate the policies of the Act.

⁵No picketing prior to that date at the college project is the subject of the complaint. The picketing near the ditch is not alleged to be an unfair labor practice.

Upon the basis of the foregoing findings and conclusions, and upon the entire record in the case, I make the following:

Conclusions of Law

1. International Brotherhood of Electrical Workers, Local Union No. 11, AFL-CIO, is a labor organization within the meaning of Section 2 (5) of the Act.

2. By inducing and encouraging employees of Robert B. McClary and Burt A. Lowe, Jr., d/b/a Hydro Company; employees of Robert E. McKee; and employees of other employers at California State Polytechnic College and at Metropolitan State Hospital building project in Norwalk, California, to engage in a concerted refusal to perform services for their several employers with an object of requiring the State of California, other employers and persons to cease doing business with Paul Gardner, or Paul Gardner Corporation, the above-named labor organization has engaged in unfair labor practices within the meaning of Section 8 (b) (4) (A) of the Act.

3. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

Recommendations

Upon the foregoing findings of fact and conclusions of law, and upon the entire record in the case,

I recommend that International Brotherhood of Electrical Workers, Local Union No. 11, AFL-CIO, its officers, representatives, and agents, shall:

1. Cease and desist from inducing or encouraging the employees of any other employers working on a project where employees of Paul Gardner or Paul Gardner Corporation are working, to engage in a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, or commodities or to perform any services for their respective employers where an object thereof is to force or require the State of California or any employer or person to cease doing business with Paul Gardner or Paul Gardner Corporation.

2. Take the following affirmative action which I find will effectuate the policies of the Act:

- (a) Post at its business office copies of the notice attached hereto as an Appendix. Copies of said notice, to be furnished by the Regional Director for the Twenty-first Region, after being duly signed by official representatives of the Respondent, shall be posted by the Respondent immediately upon receipt thereof and maintained by it for a period of sixty (60) days thereafter in conspicuous places, including all places where notices to members of the Respondent are customarily posted. Reasonable steps shall be taken by the Respondent to insure that such notices are not altered, defaced, or covered by any other material. The Respondent shall also sign copies

of the notice which the Regional Director shall make available for posting at premises where employees of Paul Gardner or Paul Gardner Corporation are working.

(b) Notify the Regional Director for the Twenty-first Region, in writing, within twenty (20) days of receipt of this Intermediate Report and Recommended Order what steps the Respondent has taken in compliance herewith.

Dated this 31st day of March 1958.

/s/ WALLACE E. ROYSTER,
Trial Examiner.

APPENDIX

Notice

To All Members of International Brotherhood of Electrical Workers, Local Union No. 11, AFL-CIO

Pursant to

The Recommendations of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby give notice that:

We Will Not induce or encourage the employees of any employer other than Paul Gardner or Paul Gardner Corporation to engage in a strike or concerted refusal in the course of their employment to use, transport, or otherwise work on goods or to

perform any service where an object thereof is to require the State of California or any employer or person to cease using, handling, selling, transporting, or otherwise dealing in the products of or to cease doing business with Paul Gardner or Paul Gardner Corporation.

Dated.....

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION No. 11, AFL-CIO,

By.....

(Representative), (Title).

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

[Title of Board and Cause.]

RESPONDENT'S EXCEPTIONS TO THE INTERMEDIATE REPORT

Comes now the Respondent above-named, and excepts to the findings, conclusions and statements in the Trial Examiner's Intermediate Report in the following respects:

Page 2, Lines 17-22—The sentence beginning “During the year * * *”

Page 2, Lines 27-29—The paragraph beginning “I find that Paul Gardner Corporation * * *”

Page 2, Lines 58-61—The sentence beginning “Contrary to the contention * * * and ending * * * for the ascertainment of jurisdiction.”

Page 3, Lines 55-57—The sentence beginning “In the context of the conversation * * *”

Page 4, Lines 4-27—The sentence beginning “I am convinced that the Board’s holding * * *” and ending “* * * within the meaning of Section 8 (b) (4) (A) of the Act.”

Page 4, Lines 31-36—The paragraph beginning “The activities of the Respondent * * *”

Page 4, Lines 40-42—The paragraph beginning “Having found that the Respondent * * *”

Page 5, Lines 7-20—The paragraphs numbered 2 and 3 of the Conclusions of Law.

Page 5, Lines 24-58—All of the recommendations.

Dated: April 21, 1958.

Respectfully submitted,

TOBRINER, LAZARUS,

BRUNDAGE & NEYHART,

By JOSEPH R. GRODIN,

Attorneys for Respondent.

[Received April 23, 1958.]

United States of America, Before the
National Labor Relations Board

Case No. 21-CC-281

Case No. 21-CC-282

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL UNION
No. 11, AFL-CIO,

and

ROBERT B. McCLARY AND BURT A. LOWE,
JR., d/b/a HYDRO COMPANY

and

PAUL GARDNER, ELECTRICAL CONTRAC-
TOR

DECISION AND ORDER

On March 31, 1958, Trial Examiner Wallace E. Royster issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions to the Intermediate Report and a supporting brief.

Pursuant to the provisions of Section 3 (b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report and the entire record in this case, including the exceptions and brief, and hereby adopts the findings, conclusions and recommendations of the Trial Examiner.

Order

Upon the entire record and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, International Brotherhood of Electrical Workers, Local Union No. 11 AFL-CIO, its officers, representatives, and agents, shall:

1. Cease and desist from:

Inducing or encouraging the employees of any other employers working on a project where employees of Paul Gardner or Paul Gardner Corporation are working, to engage in a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, or commodities or to perform any services for their respective employers where an object thereof is to force or require the State of California or any employer or

person to cease doing business with Paul Gardner or Paul Gardner Corporation.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Post at its business offices, copies of the notice attached to the Intermediate report and marked "Appendix." Copies of said notice, to be furnished by the Regional Director for the Twenty-first Region, shall, after being duly signed by the Respondent or its representative, be posted by the Respondent immediately upon receipt thereof and maintained by it for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to its members are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material;

(b) Mail to the Regional Director for the Twenty-first Region signed copies of said notice for posting at premises where employees of Paul Gardner or Paul Gardner Corporation are working.

(c) Notify the Regional Director for the Twenty-first Region in writing within ten (10) days from the date of this Order what steps the Respondent has taken to comply herewith.

¹This notice is amended by substituting for the words, "The Recommendations of a Trial Examiner" the words "A Decision and Order." In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "Pursuant to a decision and order" the words "Pursuant to a decree of the United States Court of Appeals, enforcing an order."

(Testimony of Paul Revere Gardner, Sr.)

A. 430 East Granada Court, residence; business, 901 South Sultana Avenue, Ontario.

Q. Are both of those in Ontario?

A. Yes, sir.

Q. Are you connected in any way with Paul Gardner, Electrical Contractor? A. Yes, sir.

Q. Are you he?

A. I am Paul Gardner, Electrical Contractor.

Q. How long have you been in business under that name? A. Since October, 1930.

Q. What sort of business is that, I mean—

A. It is electrical contracting, wiring.

Q. What form does your business take, is it a corporation or partnership, or sole [8*] proprietorship?

A. Recently it has been incorporated.

Q. How recently?

A. The papers were filed the first of October, 1957.

Q. Are you now operating as a corporation?

A. Yes, sir. [9]

* * *

Q. Have they picketed any other jobs?

A. They have.

Q. Where? A. At Norwalk.

Q. What job is that?

A. That is the Norwalk State Hospital.

Q. What work were you doing at that job?

A. We are installing primary service, street lighting, some pole line work.

(Testimony of Paul Revere Gardner, Sr.)

Q. Do you do that—are you doing that work as a—well, from whom do you hold your contract?

A. The State of California, Department of Architecture.

Q. Are they picketing or have they picketed you at any other jobs?

A. Yes, at Cal Poly Campus.

Q. What is Cal Poly?

A. That is a school campus located west of Pomona, California Polytechnic Institution.

Q. From whom do you hold your contract on that job?

A. The State of California, Division of Architecture.

Q. Where is that job located?

A. West of Pomona on the, known as the Kellogg Campus of [23] Cal Poly.

Q. When did you start performance of that contract in Kellogg Campus?

A. Around the 1st of October, if my memory serves me right.

Q. What work are you doing at the Kellogg Campus?

A. Installing primary service, street lighting, parking yard lighting, and telemetering equipment, control equipment.

Q. In the course of that job have you had occasion to work in the same places as any other contractors?

A. At various times, yes.

Q. Now, at the beginning of that job did you have occasion to work at the same locations as

(Testimony of Paul Revere Gardner, Sr.)

the Hydro Company? A. We did.

Q. Where was that location on the job?

A. It was on the easternmost part of the job, commonly designated as the field, farming area.

Q. And, what was the nature of the work that was done there?

A. We were installing telemetering connections, wiring, and control circuits for their water system.

Q. And what is the nature of that installation, I mean, what the work consisted of?

A. It is underground conduit, it is placed underground with the water lines, or adjacent to it, or above it.

Q. Was it to be placed in the same underground ditch as the [24] water lines?

A. In this instance it was.

Q. Now, who dug that ditch, do you know?

A. The Hydro people dug the ditch.

Q. Was there any picketing during the time that you were performing that part of the contract? A. There was.

Q. Can you tell me where the picketing took place?

A. It was on the road where this ditch crossed the road entering the field. I don't believe I know the names of the roads on the campus area.

* * *

Q. (By Mr. Weil): Did your men work every day on that job? A. Not every day.

(Testimony of Paul Revere Gardner, Sr.)

Q. Now, did you—let us go into that a little bit. Did you have men working on that job?

A. We had men working there, yes.

Q. How many men?

A. I believe at the time there were three, possibly four.

Q. Did those men, do you know whether those men went directly to their job from their homes when they started work in the morning? [25]

A. They went directly to the job from my place of business.

Q. After the job, after they completed their work for a day, did they return to your place of business from that job? A. Yes, sir.

Q. Who furnished the transportation back and forth from it between your place of business and the job? A. I do.

Q. Is that your procedure in all cases?

A. It is a common practice in our job, yes.

Q. How far was it, approximately how far is it from your place of business to that job?

A. Approximately nine miles. [26]

* * *

Q. Now, when you first saw the picketing taking place, how long was that after the picketing commenced, if you know? [29]

A. Well, I was on the job within, I think the second day after the picket was established on it.

Q. Where was the picket at that time?

A. He was down on the ditch that Hydro had dug on the eastern portion of the campus.

(Testimony of Paul Revere Gardner, Sr.)

Q. Was that ditch in sight of where your men were working? A. Yes.

Q. In fact, was that the ditch, the ditch where your men were working?

A. That is where they were working. [30]

* * *

Q. Have you ever been picketed at your place of business by any labor organization?

A. Never have. [40]

* * *

Cross-Examination

By Mr. Brundage:

Q. Mr. Gardner, as I understand your testimony, some time during the last year an organization was incorporated known as Paul Gardner Electric Corporation, is that correct, sir, or Paul Gardner Corporation?

A. Just Paul Gardner Corporation.

Q. When was Paul Gardner Corporation incorporated?

A. The papers were filed for incorporation on the 1st of October, 1957.

Q. And, did you receive notification from the Secretary of State with respect to the disposition of the papers which were filed with the Secretary of State?

A. They would accept the name as proposed, and that when proper papers were filed with them they would proceed with the [41] corporation.

(Testimony of Paul Revere Gardner, Sr.)

Q. Well, have proper papers been filed with them? A. They have been.

Q. And you have received notice that Paul Gardner Corporation is recognized, is a recognized corporation in the State of California?

A. That is right.

Q. And can you tell me approximately when you received such notification?

A. Around the middle of October.

Q. Now, can you tell me approximately when you commenced work on the California State Polytechnic College job to which you testified?

A. Between the 1st and the middle of October, in that neighborhood.

Q. Somewhere between the 1st and middle of October? A. Yes.

Q. I take it that that was about approximately the same time that you received notification from the Secretary of State with respect to the incorporation, is that correct? A. Well, yes.

Q. And the work that is being performed on the Polytechnic job is work which is being performed by the corporation, is that correct?

A. No, the work being performed by myself as an individual [42] because the contract is in my name. [43]

* * *

Q. Now, first let me ask you, Mr. Gardner, does Paul Gardner Corporation have a place of business? A. They do.

(Testimony of Paul Revere Gardner, Sr.)

Q. And where is that place of business?

A. At 901 South Sultana Avenue.

Q. I am sorry, will you tell me the address again?

A. 901 South Sultana Avenue, Ontario, California. S-u-l-t-a-n-a.

Q. Right now this is the place of business of the corporation. Was this also the place of business of the proprietorship? A. That is right.

Q. I see. And the corporation has succeeded to the physical assets of the proprietorship insofar as this place of business is concerned, is that right?

A. Right.

Q. Is that right? A. That is right.

Q. I wonder, Mr. Gardner, if you would physically describe for us this place of business which is now Paul Gardner Corporation?

A. It is located on the southeast corner of Sultana and Ralston Street in Ontario. The property is 100 feet by 172 feet. [46]

Q. That is the real property, I take it?

A. That is right.

Q. On which some sort of building is located?

A. It has a building on it 40 by 110 feet at an "L." That building lies north and south, and there is an "L" goes off of the south end of the 120-foot space going west, for a distance of 60 feet by 24 feet wide.

Q. And an "L," what do you mean by that, sir, do you mean the shape of the building?

A. Yes, and "L."

(Testimony of Paul Revere Gardner, Sr.)

Q. All right. And how far does that go, Mr. Gardner? A. It goes 60 feet by 24 feet wide.

Q. All right.

A. Starting at the front going back the 110 feet to the extent of the building, then a fence continues on back the distance of the 172 feet. The property other than the building is fenced all around. There is an equipment and storage yard south of the building. And a parking area, a paved parking area, gas pump and freight receiving access within the "L." That is it. [47]

* * *

Q. Now, when you are in the office, Mr. Gardner, this office that you refer to there, I take it you concern yourself primarily with the administrative and business functions of the job, is that correct? A. Right. [51]

* * *

Q. In the shed, O.K.

Now, then, beyond the office what do you have, Mr. Gardner, in the building?

A. What do you mean?

Q. In addition to the office?

A. Oh, general supplies that you would find in any modern electrical shop. [52]

* * *

Q. All right. Now, when the truck drives in, does the truck driver ordinarily bring the material into the warehouse, or does he ordinarily store the

(Testimony of Paul Revere Gardner, Sr.)

material on the street, or on the road, or how does that work?

A. He backs up to the door and unloads it in the building.

Q. Does he physically carry it into the building ordinarily?

A. He usually doesn't have to. On the back of the truck he has a freight lift, and it sets it in the building.

Q. Now, he sets it on the freight life and then it is into the building. Who ordinarily operates this freight lift that you speak of?

A. Anyone that happens to be there, usually the bookkeeper.

Q. Usually the bookkeeper? [54]

A. Right.

Q. And when you say anyone who happens to be there, do you mean yourself, or Paul, Jr., if the bookkeeper is not there?

A. Yes, or if some of the men happen to be around the shop when the load of freight comes in they will unload it.

Q. All right. Now, then, I want to be sure that I have this clear. Insofar as the building is concerned, beyond the question of the office, and this general supply room, is there any other room, office, building or anything in which any other activity takes place other than what you have described to us?

A. Well, there is a garage area on this of 60

(Testimony of Paul Revere Gardner, Sr.)

by 24 "L," but there again this material and trucks in that, our trucks——

Q. Material and trucks? A. Yes.

Q. You say your trucks? A. Sure.

Q. All right. And I take it that this is used primarily for the normal purposes that you use a garage, namely, to store your trucks?

A. That is right. [55]

* * *

Q. Now, I want to know if you use the room for any purposes other than storing the material that you have described for us.

A. You might occasionally have a little repair job in the shop, and it would be taken care of there. You might build something in it, we do frequently. [56]

* * *

Q. Around town on these other jobs that you get. All right. Now, what time do the men ordinary report to the shop in the morning?

A. Ordinarily prior to 8:00 o'clock.

Q. Prior to 8:00 o'clock. Is it a rule of the company that everybody reports to the shop?

A. Everybody reports to the shop.

Q. Regardless of where he lives?

A. That is right.

Q. Now, then, when the men get to the shop, they get there prior to 8:00, do you mean they have

(Testimony of Paul Revere Gardner, Sr.)

to be there by 8:00, or do you mean they are told how much prior to 8:00, if they are told?

A. They have to be there by 8:00.

Q. Be there by eight? A. Sure.

Q. O.K. Now, under normal circumstances they get there by 8:00 o'clock, then do they have any kind of timecard? A. Yes, they do.

Q. Do they punch it in when they get to the place?

A. No, we make it out at night when they come in from the job. [72]

Q. There is no timeclock?

A. No timeclock.

Q. Timecard but no timeclock?

A. No timeclock.

Q. When the men arrive at the shop, will you tell me under ordinary circumstances what happens?

A. Well, they just come into the shop, and get assigned to their trucks, or whoever——

Q. Who assigns them to the trucks?

A. Oh, any one of half a dozen of us could. Paul or myself or one of the other men that is working on the job. He says I want a certain man, he might tell us the night before, we tell him take him in the morning.

Q. In which case he will talk directly to the man? A. Sure.

Q. Do these men come into the office, or do they come into the garage, or in the yard, or where do they assemble?

(Testimony of Paul Revere Gardner, Sr.)

A. Some of them come in the back gate, back through the back door. Some of them come in the front door. All of them are usually in the, what we call a receiving door, or where they check materials out, or in that vicinity every morning.

Q. Now, then, on or about 8:00 o'clock do you then assign the men to the trucks, is that what happens?

A. If they are working on a job.

Q. They just get in the trucks? [73]

A. They automatically know where they are going, unless told differently.

Q. Mr. Gardner, with respect to the, do you have certain men who are assigned to driving the trucks as a normal routine?

A. No, it isn't, sorry to say.

Q. By that do I understand you mean something like this, that the men will just decide among themselves who is going to drive the truck out to a job?

A. Among themselves, or an individual says come on, let's go, and they take off.

Q. All right. Now, is there under ordinary circumstances a particular truck assigned to a particular job? Let me be a little more specific. Supposing I was one of the men working on the Cal Poly job, and I take it that if I were working on the Cal Poly job, unless I heard from you or Paul, Jr., to the contrary, I would assume that I would continue working on the Cal Poly job. Now, when I come into the yard in the morning, would I know which truck to go to?

(Testimony of Paul Revere Gardner, Sr.)

A. Well, normally I would say so.

Q. So that of these trucks, you in a sense have them assigned around at least to the extent that at least one truck, unless there are orders to the contrary, will proceed to one job, is that correct?

A. That is the normal procedure.

Q. All right. Now, so that the men will assemble and get [74] on the trucks, and then one of them will decide they are going to drive, or at least they will work that out among themselves, is that right?

A. The guy that decides he is going to drive it usually is in there first.

Q. All right. Now, are there some duties that the men have to perform before they go out on the job?

A. No, I wouldn't say so.

Q. All right. But—

A. But they have particular tools they want to take, or that they trade in for one truck, or another, they load them.

Q. Do the men own their own tools?

A. They all own their own hand tools.

Q. Yes. What kind of tools might they need?

A. Oh, we have various tools, any construction tool that is used on an electrical job.

Q. So they go in and take it out of the shop?

A. It might be on a truck.

Q. Do they sign out for these tools, or anything of that sort?

A. No.

Q. All right. Now, then, they will go on out to the job. Now, do they come back during the day? Do they come back at lunch time?

(Testimony of Paul Revere Gardner, Sr.)

A. No. [75]

Q. Do they come back during the morning?

A. Only if someone needs some materials, someone might come back and pick it up.

Q. But in the normal course of their business they do not return to the shop then again until that evening, is that right? A. Right.

Q. And then, now, what time do they ordinarily leave the job? A. 4:30.

Q. And then they will be driving back to the shop, is that right? A. Right.

Q. Now, Mr. Gardner, as I understand it, they all report at about 8:00 o'clock, and that is regardless of where the job is, is that right?

A. Right.

Q. Now, when they get back the truck drives them back and leaves the job at 4:30, and some may get in—I am sorry, strike that.

The time at which they arrive back will obviously vary depending upon what job they are working at, is that right, Mr. Gardner?

A. Oh, sure. [76]

* * *

Q. (By Mr. Brundage): Yes. My question is whether they are compensated up until the point at which they arrive back at the shop, or whether their compensation ends at 4:30.

A. Their compensation, unless they are working overtime, ends at 4:30.

Q. Yes. [78]

* * *

(Testimony of Paul Revere Gardner, Sr.)

Q. All right. Now, when you first commenced work on the job, where did the work commence?

A. At the extreme east portion of the job where Hydro had dug a ditch for use to lay their water line, and we to lay telemetering line on top of it.

Q. Now, I think you told us this morning, but I wonder if you would mind repeating it, how far from your place of business in Ontario is it to the campus?

A. Well, I think I stated within nine miles. [82]

* * *

Q. I can make the question perhaps a little clearer.

When you got out to the job were your men working in the ditch?

A. Not necessarily in the ditch, alongside of the ditch.

Q. Alongside of the ditch? A. Yes, sir.

Q. And approximately how many men did you have working? A. Oh, three or four.

Q. Three or four. Were there some Hydro men working in the ditch?

A. Not at the time I was out there.

Q. Your men were the only men working in the ditch, is that right? A. That is right.

Q. Was there anyone engaging in any picketing?

A. The picket was established on the road at the end of the ditch, yes.

Q. There was a picket at the road near the

(Testimony of Paul Revere Gardner, Sr.)

ditch, is that [84] right? A. Right.

Q. And, as I understand it, or do I understand that at that portion of the campus there is not a fence around the property?

A. There is fence on both sides of the road.

Q. Well, was there a fence in between where the people were working in the ditch and where the picket was?

A. I believe there was.

Q. All right. So that the picket was marching, if we might use the term, outside the fence insofar as the campus is concerned, and the people were working inside, is that substantially correct?

A. I wouldn't say that, I would say he was [85] sitting.

* * *

Q. Now, could you, on the basis of your having been out there estimate for us the approximate distance from the ditch to where the car or the picket sign was normally located when you were out there?

A. Well, the car was parked by this tree, pretty close to this bank of dirt, and the sign was right in the bank there. (Indicating.)

Q. I mean, have you any idea in terms of feet or yards? A. From the ditch, or from what?

Q. Yes, from the ditch, sir. [88]

A. Oh, ten yards. [89]

* * *

Q. Now, directing your attention now to the Nor-

walk job, approximately how far distant is that from your place of business in Ontario?

A. Oh, it is between 35 and 40 miles.

Q. Between 35 and 40 miles?

A. Yes. [94]

* * *

Q. And it was when your employees moved up to the main part of the job that the picket moved up to the main gate, is that [96] right?

A. No, that is not right.

Q. All right. Will you tell me?

A. He moved up later, maybe a week, ten days after we had performed work on the main part of the job.

Q. All right. Now, at the time that they—they did not move a picket up to the main gate before your people moved up to the main part of the job, did they? A. They did not.

Q. When your people moved to what you call the main part of the job, where was that in relationship to the main gate?

A. Well, it is probably half, three-quarters of a mile west of the main gate.

Q. That was inside the campus, is that right?

A. That is right. [97]

* * *

OLIN EUGENE LESH

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Weil:

Q. Will you give us your full name, please, and your address?

A. Olin Eugene Lesh. Address, 135 South Manzanita Drive, West Covina.

Q. What is your business or profession, Mr. Lesh?

A. Project superintendent for Robert E. McKee, General Contractor.

Q. I beg your pardon. Is Robert E. McKee, General Contractor, concerned in any way with the Metropolitan State Hospital Extension Project now going on?

A. Yes, we have the general contract of that job.

Q. What does your general contract consist of? I mean, what job are you contracting to do there?

A. Well, the complete building other than the electrical and plumbing work. [104]

* * *

Q. Has that project, to your knowledge, ever been picketed [107] by Local 11?

A. Yes, it has.

Q. Can you tell me when the pickets first appeared? A. 12:30 on November 12th.

(Testimony of Olin Eugene Lesh.)

Q. What, if anything, happened then?

A. Pardon?

Q. What, if anything, happened when the pickets appeared?

A. Well, it was at noon, and all of our employees, and all of our subcontractors' employees did not go back to work.

Q. Do you know whether the employees of the other prime contractors on the job went back to work?

A. They did not.

Q. Were any employees at all working at that time after picketing began?

A. Gardner Electric.

Q. Did that picketing continue after that date?

A. Yes, it did.

Q. At 12:00 o'clock? Did it continue each day after that date for any period of time?

A. Each day until November 21st.

Q. Between the period 12:30 on the 12th of November and November 21st did any of your employees return to work?

A. No.

Q. Did any employees of any other employers on the job return to work other than Paul Gardner's employees? [108]

A. No.

Q. Did Paul Garner's employees work throughout that period?

A. Every day to my knowledge except November 20th.

Q. What happened on November 20th that you know?

(Testimony of Olin Eugene Lesh.)

A. Gardner's men did not work, and there was still a picket.

Q. Did your people return to work that day?

A. No.

Q. Now, did you have occasion to read the picket sign? A. Yes, I did.

Q. Do you recall what it said?

A. Yes, I think so, it said, "To employees: Paul," the initial "F" or "E," "Gardner is non-union. Join Local"—let's see, the initials were "Electrical Workers No. 11," and at the bottom it said, "This is," it said, either "Organized" or "Authorized" picket line.

Mr. Brundage: I wonder if you would like to stipulate. He said this is an organizational picket line. I have the sign, if you are prepared to stipulate.

Mr. Weil: If you have the sign—I haven't seen it yet.

Mr. Brundage: We have the sign. We will bring it in. I mean on my representation if you are prepared to stipulate, "This is an organizational picket line."

Mr. Weil: Fine. I will be glad to accept that stipulation. I will be glad to enter into that stipulation.

Mr. Brundage: All right. [109]

Q. (By Mr. Weil): Now, did the picket line continue through the 21st of November?

A. It was there on the 21st of November, and was removed some time during the day. Now, I

(Testimony of Olin Eugene Lesh.)

don't know whether it was prior or subsequent to noon.

Q. Did your employees return to work after the picket sign was removed? A. Not that day.

Q. Did they return the next day?

A. Yes, on the 22nd.

Q. Now, during the period between the 12th and the 21st of November, 1957, did your employees fail to return to work because of your orders? In other words, did you order them not to come back to work? A. No; I did not.

Q. Where was the picket sign that you saw, where was it located with reference to the job?

A. Do you have a blackboard? Well, it was in the extreme northeast corner removed from the general site, however——

Q. Was it on an access road?

A. It was on an access road.

Q. Was it on the Bloomfield access road?

A. The northerly access road off Bloomfield.

Q. There were two, one is the north, one to the south? A. Correct. [110]

Q. Was the sign simply posted, or was there a picket carrying the sign?

A. There was a picket carrying the sign.

Q. Did you have any conversation with the picket?

A. No, other than Good morning. I mean, pickets were men that had worked on the job.

Q. They were men that had worked on the job?

A. Yes.

(Testimony of Olin Eugene Lesh.)

Q. So you knew the pickets? A. Yes.

Mr. Weil: I have no other questions of this witness.

Mr. Hildreth: I have no questions.

Cross-Examination

By Mr. Brundage:

Q. Mr. Lesh, is it? A. Lesh.

Q. Yes. Mr. Lesh, when did you say the picket first appeared on the Norwalk job?

A. As being posted, you mean——

Q. Now, when did a man with a picket first appear on the job?

A. On November 12th, to my knowledge.

Q. All right. Now, then, how many pickets or how many men engaged in picketing were there on this particular date? I am not talking about whether the men changed, how many people were engaged in picketing?

A. Well, what constitutes picketing, a man carrying a picket [111] sign, or a man just being there?

Q. Under the rules of this game, I get to ask the questions, you give the answers. If you don't understand me, you just tell me you don't understand the question and I will try to put it to you again. A. O.K.

Q. You don't understand what I mean. I thought that the counsel asked you if pickets appeared on the jobsite, I may have misunderstood what I heard

(Testimony of Olin Eugene Lesh.)

him say, asked of you, and I thought you said that, yes, pickets appeared on November 12th. Now, if you say that pickets appeared on November 12th, I am asking you how many appeared?

A. It was one man carrying a sign.

Q. All right. That is all I wanted to know. There was one man carrying a sign?

A. Yes.

Q. Where was he carrying the sign, sir?

A. On an access road north, north access road off of Bloomfield.

Q. And what relationship does that have in terms of geographical proximity to the gate that you testified was the main gate?

A. I don't understand.

Q. Well, I will see if I can make it a little clearer. As I understood your testimony before, I made a little [112] diagram here, and I may have gotten it wrong. I thought you said the main gate was located at the northeast corner of the project, am I wrong about that?

A. I think so, yes.

Q. You think I am wrong? A. Yes.

Q. Where is it located?

A. The main gate to the hospital grounds is on Norwalk Boulevard.

Q. I am sorry. I was talking about what I understood to be the main entrance through which the majority of the workers went to work on the project.

(Testimony of Olin Eugene Lesh.)

A. Well, that most commonly used entrance is the north access road off of Bloomfield. [113]

* * *

Q. Do you know from your own knowledge whether there were any conversations between the picket and any of the other employees?

A. No.

Q. Were the number of pickets increased at any time? A. Not to my knowledge.

Q. Was the picketing confined to this one gate?

A. Yes.

Q. And I wonder if you could tell me this, Mr. Lesh—I am sorry. Strike that. Let me put the question this way.

First a preliminary question.

I take it that the work that Gardner Electric was doing was work of electrical nature, is that right?

A. Yes.

Q. All right. Now, where was the work that Gardner Electric was performing in relation to this, I think I referred to it as the main entrance, what I mean is the entrance through which most of the employees passed where the picket was placed, where was the work that Gardner Electric was doing with relation to that?

A. Oh, it was 1,500 or 2,000 feet away.

Q. In which direction?

A. Due west. [117]

Q. I am not sure that I understand the picture clearly with respect to the various access roads, but

(Testimony of Olin Eugene Lesh.)

was there an access road that was closer to the electrical work than the one on which the picket was placed? A. Yes, I would say so.

Q. Where was that?

A. That is on the west side of the hospital.

Q. On the west side of the hospital. What access, what street does that run on?

A. Norwalk Boulevard.

Q. And about how far would that be, sir?

A. About the same distance.

Q. About the same distance?

A. Actually it is the same distance either way.

Q. Then I take it there is no other access road that is closer?

I am sorry. What I understand your testimony to be, at first you said that there was a road closer, and then as I understand it in response to my second question you say that both roads are approximately equi-distant?

A. Approximately the same from both. [118]

* * *

ROBERT B. McCLARY

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Weil:

Q. Will you give us your full name, please, and your address?

A. Robert C. McClary. My residence is 9303

(Testimony of Robert B. McClary.)

Otto Street, Downey. My business address is 3321 Century Boulevard, Lynwood.

Q. What is your business or profession, Mr. McClary?

A. I am a partner in Hydro Company, a general engineering contracting firm.

Q. Who are the other partners?

A. I have one partner, his name is Burt A. Lowe, Jr.

Q. During the operation of the business of your company have you had occasion to do any work at the Cal State Polytechnic College, Kellogg Campus?

A. Yes. [119]

Q. What is the nature of your work there?

A. It is called mechanical work.

Q. Has it to do with the laying of pipe, and other work of that nature?

A. Yes, it has. [120]

* * *

A. On the 18th of October a picket was placed at this location shown in the pictures.

Q. Did you have any conversation with that picket? A. Yes.

Q. Was there anyone else present during the conversation? A. Yes.

Q. Who?

A. Well, to clarify, we did talk to the picket almost every day, and my foreman was there.

Mr. Brundage: Hold it. I didn't know that was responsive to a particular question. He has asked

(Testimony of Robert B. McClary.)

him if he talked to the picket on a particular day, he said, yes; then the next [125] series of questions was who was there.

Trial Examiner: I thought that he had asked if he had spoke to the picket and he answered, yes; then he asked who was there, and the witness was explaining, well, I talked to the picket on many occasions, and on some occasion someone else was present.

Mr. Brundage: All right.

Q. (By Mr. Weil): Did the picketing have any effect on your job? A. Yes, it did.

Q. The work that you were doing, what effect did it have?

A. Well, it slowed our work down considerably.

Q. How did it do that?

A. My men wouldn't work on the pipeline while the picket was in this location. [126]

* * *

Mr. Brundage: This is Mr. Devereaux.

Q. (By Mr. Weil): When was this conversation?

A. To the best of my knowledge, it would be in the first week of November. I don't remember the exact date.

Q. Will you tell us what was said by you, by Mr. Devereaux, by anyone who was present?

A. I attempted to find out in what manner we might proceed with our job, and I asked him if he was picketing our work, to which he replied, no.

(Testimony of Robert B. McClary.)

Then I asked him if he considered the part of our trench which was to be used by Paul Gardner for conduit unfair, to which he relied, yes.

Q. Is there anything else? A. Yes. [128]

Trial Examiner: Was there an answer?

(The record was read.)

The Witness: Then I asked him if we could proceed with the work after hours, or on Saturdays and Sundays when the picket was not there, and he said that that would be wrong. He also stated that if we proceeded with the work we knew that would happen to us. Not to us, we knew what would happen.

Q. (By Mr. Weil): Is there anything else that you recall?

A. That is the substance, as I recall it.

Q. Did you know what would happen in connection with the work? A. No.

Q. How much of the time were the pickets picketing at that time, were they picketing all day, do you know?

A. At the time of our conversation?

Q. Yes. A. Yes, they were.

Q. Do you know whether they were picketing after working hours?

A. They had started to that day.

Q. Do you know whether they picketed at all times after that day around the clock?

A. No, I don't know.

Q. Now, did the picketing continue after your

(Testimony of Robert B. McClary.)

conversation with Mr. Devereaux? A. Yes.

Q. Was there picketing every day thereafter, every working day? [129] A. Yes.

Q. Was Paul Gardner, or were Paul Gardner's employees present on the job every working day thereafter? A. No.

Q. Do you recall any specific day on which Paul Gardner's employees were not present?

A. To my knowledge, on October 31st, November 1st and November 4th, to my knowledge.

Q. On those days there was no Gardner employee present on the job, to your knowledge?

A. That is right; yes.

Q. Did the picketing continue during those, on those days? A. Yes.

Q. Did your employees work during those days?

A. Yes.

Q. Was there any cessation of work by your employees during those days? A. Yes.

Q. When did they work, and when did they not?

A. Well, they worked intermittently.

Q. Did you have some sort of a crisis at that time? A. We felt that we did have, yes.

Q. What was the situation?

A. We had about, oh, in excess of 7,000 feet of transite pipe in the ground, and we felt that if it should rain at that time [130] that we might, the pipe would float out of the ground, and we might lose our investment there.

Q. Did you do anything about that possibility?

A. I personally tried to by ordering my men to

(Testimony of Robert B. McClary.)

cover up the pipe, and some progress was made in that direction, however, the pipe was not covered at that time.

Q. Well, do you know, did your men refuse to work as you ordered them? A. Yes. [131]

* * *

Q. All right. Having specific reference to your shop steward, when did he first tell you?

A. The first day the picket appeared on this location.

Q. What did he tell you?

A. He told me that he couldn't cross the picket line.

Q. Thereafter did he speak to you about it?

A. Yes.

Q. On October 31st did he speak to you about it?

A. I don't know.

Q. You testified that on October 31st you tried to do something about this situation by telling the men to get the pipe covered. Did you have any talk after that with the shop steward? A. Yes.

Q. Of that date? A. Yes.

Q. Who else was present?

A. My superintendent and the inspector on the job.

Q. And was that on the jobsite that you had this talk?

A. At this location shown in the pictures.

Q. Will you give us the conversation that you had then?

(Testimony of Robert B. McClary.)

A. I don't remember the exact words, but I told them that we wanted to make a tie-in into the Metropolitan Water Department at this location, and that that was the only opportunity we [132] had to get water to fill the pipe, in case it should suddenly start to rain. So the shop steward said he would have to go call the union hall, which I assumed that he did. And when he came back he told me that the dispatcher had told him to make this tie-in under no circumstances.

Q. Thereafter was the tie-in made that day?

A. No.

Q. Or the next day? A. No.

Q. Did your men do any work that day, that is, the 31st of October, 1957?

A. Yes, some of the men did, some worked.

Q. Now, you said Gardner's employees were not present at that time, do you know why not?

A. I assume it was because I called Paul, Jr., and asked him not to have any men there that day.

Q. Now, do you know whether Gardner's employees were working anywhere else on the project at that time?

A. Not to my knowledge. [133]

* * *

Q. (By Mr. Weil): Now, after you had taken the pictures which are General Counsel's Exhibit 4, was there any change in the picketing after you took those pictures? A. Yes.

Q. When did such change take place?

(Testimony of Robert B. McClary.)

A. Oh, about November 18th.

Q. What was the change that took place?

Mr. Brundage: Is this the same question that I raised this morning as to this change that took place?

Mr. Weil: No.

The Witness: Yes.

Mr. Brundage: Something that you are contending constitutes an unfair labor practice?

Mr. Weil: Yes, this is the different change than that.

Mr. Brundage: Oh, I am sorry.

Q. (By Mr. Weil): What was this change?

A. The picket was removed from this location.

Q. Did he go to another location? Was there picketing at [135] another location? A. Yes.

Q. Where?

A. To my knowledge there was a picket on the road leading into the campus from Old Valley Boulevard.

Q. Do you know what, if any, effect this change of picketing had?

A. Yes, it materially decreased the number of working men on the job.

Q. Did your men——

Mr. Brundage: Just a moment. Is he testifying to that from his own knowledge?

The Witness: Yes.

Mr. Brundage: Wait a minute. I didn't ask you. Counsel, is he?

Mr. Weil: I will answer yes, too.

(Testimony of Robert B. McClary.)

Mr. Brundage: Then I assume that you will lay some foundation?

Mr. Weil: I am going into it with respect to find out what he knows.

Trial Examiner: All right. Go ahead.

Q. (By Mr. Weil): Did you have men working at other parts of the job than that ditch shown in the picture, on November 18th, or around that time?

A. Yes. [136]

Q. What other parts of the job?

A. Near the Roundhouse.

Q. Where is that on the campus?

A. It is more or less on the boundary between the construction area, the main construction area and this general field area which is on the east part of the campus.

Q. Is that field a rough rectangle, roughly rectangular?

A. No, that wouldn't be a good way to describe it.

Q. Well, from the point at which you took that picture, in what direction is the main building which is being constructed?

A. It would be west and southwest.

Q. Did you have work done by the main building?

A. Yes.

Q. That you were doing at about, on November 18th, around that time?

A. Yes.

Q. What sort of work was that?

A. Pipeline work.

(Testimony of Robert B. McClary.)

Q. Did you have work to the north of the main building? A. Yes.

Q. Did your work take you all around the project?

A. Not into an area that I believe they call the stables area, but generally other than that.

Q. Where is the stable area located from the main buildings? [137]

A. I should say it is about due south of the Administration Building.

Q. And what direction are the main buildings from the Administration Building? I mean, the main buildings that are being constructed from the Administration Building? A. East.

Q. Now, in the area in which your men were **working**, were you, yourself, in and around this area daily? A. Almost every day.

Q. Now, on and immediately after November 18 were you in this area? A. Yes.

Q. Were other employer's employees working?

A. To my knowledge only two, only the men from two employers.

Q. Were your men working? A. No.

Q. Had your men ceased work because you had told them to? A. No.

Q. Had you told them to continue working?

A. Yes.

Q. Was the job largely shut down at that time?

A. I should say so, yes.

Mr. Weil: I have no other questions. [138]

(Testimony of Robert B. McClary.)

Cross-Examination

By Mr. Brundage:

Q. Now, was he in close proximity to this ditch that appears in General Counsel's 4?

A. No, not—well, you will have to make the question a little more specific, I don't know what you mean by close.

Q. All right. Where was he in relationship to the ditch?

A. He was about 150 yards due east of the end of the main ditch down that field there.

Q. Was he on the campus property?

A. I don't believe so.

Q. Was the ditch on the campus property?

A. Yes.

Q. Was he as close as he could get to the campus property, that is, was he on the bank of the road just outside the campus [139-144] property?

A. Yes, by the fence.

* * *

Q. All right. And did your men continue to work during that [145] three of four day period?

A. Yes.

* * *

Q. Now, what happened when the picket moved insofar as your men were concerned?

A. They stopped work.

(Testimony of Robert B. McClary.)

Q. Now, did they stop work in the morning, or did they fail to report to work, or what took [146] place?

A. They were disinclined to work anywhere near the picket.

Q. Well, let me ask a little specifically about that, Mr. McClary, did they walk off the job?

A. No, they didn't. [147]

* * *

Q. What I want to know is, if I understood your testimony, you correct me if I am wrong, what the superintendent in effect told you was, that the men didn't want to work on that part of the ditch near which Gardner employees were employed, is that substantially correct, or is that wrong?

A. That is substantially correct.

Q. All right. And then I take it that either one or two of two things happened, either you assigned them to some other part of the job and they continued to work, or they left the job?

A. They went home, that is correct.

Q. All right. Now, did they go home?

A. Yes.

Q. Was that—I am sorry, go ahead.

A. I don't want to say yes to, some men did on some days go home during the day.

Q. Some men left and went home some days during the day on their own accord without your telling them to do that?

A. Yes.

(Testimony of Robert B. McClary.)

Q. Other men continued to work, is that right?

A. Right, yes.

Q. Now, do we have an accurate picture of it? Some men left, [148] and some men continued to work. And was there implied in your answer, Mr. McClary, did I catch in your answer the fact that some men would come back and then they would work a little while, or a day or two or three, and then they would leave and they wouldn't come back the next day, then they would come back again, is that right?

A. That is correct.

Q. Is that right? A. Yes.

Q. Let me then just clarify this to see if we have the picture.

Some men just continued to work?

A. Yes.

Q. I mean, they just stayed right on the job at least all the way through October? A. Yes.

Q. All right. Other men left the job, but would come back and work? A. Yes.

Q. And would work some days, and then wouldn't show up on another day, and then maybe after one day or two days would come back and work again, is that right?

Understand, I am not trying to put any words in your mouth.

A. I know. To make it clear, I don't think anyone failed to show up on a given day. However, they did occasionally show up [149] and not go to work.

Q. You mean, they would report on to the job

(Testimony of Robert B. McClary.)

and then they would leave the job after they reported there? A. Yes.

Q. All right. Now, this was the situation through October, at least until October 31st, is that right?

A. Yes.

Q. Now, these men continued to work, as I understand it, those who did work despite the fact the picket was there? A. Yes.

Q. Now, did anything special occur on October 31st? A. Yes.

Q. And now will you tell us again, Mr. McClary, what occurred?

A. Paul Gardner's men didn't show up that day.

Q. They didn't appear at all that day. Now, did your men appear? A. Yes.

Q. And the picket at this time was still in close proximity to the ditch as shown on your picture, right? A. Yes.

Q. Is that the day Gardner's men did not appear because you had phoned Paul Gardner, Jr., and told him not to come, is that why?

A. Yes, I believe that is right, that is the reason.

Q. Did your men come? [150] A. Yes.

Q. Did they work in the ditch?

A. Not at this location.

Q. Was that because you were working them at a different location? A. Yes.

Q. Now, then, do I understand, Mr. McClary, that on October 31st there were no employees working in that ditch where the picket was, is that right?

A. Not where shown on this picture here.

(Testimony of Robert B. McClary.)

Q. Well, yes. That they may have been working, your men may have been working at some distance?

A. Yes.

Q. Away? A. Yes.

Q. And approximately how far away again, would you estimate that, Mr. McClary?

A. About 2,200 feet.

Q. About 2,200 feet. [151]

* * *

Q. Now, did you have any materials coming in during this period of time, October, November and December? A. Yes.

Q. And were those materials delivered?

A. Yes.

Q. And do I understand that insofar as materials that went to your company, or your operations are concerned on that job, that this is the only instance that you know of?

A. The only one I saw.

Q. The only one you saw. Well, my question is, do you know of any instance involving materials going to your company where those materials were stopped from coming on to the job? A. No.

Q. And, as I understand it, you were receiving materials during the months of October, November and December? A. Yes. [159]

* * *

(Testimony of Robert B. McClary.)

Recross-Examination

By Mr. Brundage:

Q. As I understand it, despite these conversations that you had around October 18th, a portion of your crew continued to work, is that right?

A. Yes.

Q. And the remainder of the crew worked on a sort of intermittent basis, is that right? [168]

A. Yes.

* * *

PAUL REVERE GARDNER, JR.

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Weil:

Q. Will you give us your full name and address, please?

A. Paul Revere Gardner, Jr. The address is 576 Aspen Way, Upland, California.

Q. Were you here during the testimony given by Paul Gardner, Sr.? A. I was.

Q. Are you the son to whom he referred as Paul Gardner, Jr.? A. That is correct.

Q. You are a partner, I mean, not a partner, vice president of the Paul Gardner Company?

A. That is correct.

(Testimony of Paul Revere Gardner, Jr.)

Q. With specific reference to the job at the Kellogg Campus of the Polytechnic College, did you at any time after the picketing started withdraw your men from that job for any [169] period of time? A. Yes, sir.

Q. Do you recall when?

A. I haven't the exact date in my mind, although I have it in notes in our job file.

Q. Well, do you recall approximately when?

A. The approximate date is right at the end of October, or first of November.

Q. Were your men off that job entirely at that time? A. That is correct.

Q. Were they off the job entirely for more than one day?

A. We had more than one day in which we were off the job. The specific day that I believe you have reference to is the day on which Bob McClary called me just before starting time in the morning, he called and requesttd that we keep our men off the job in order that he could try to center-load the pipe and prevent it from being damaged because a heavy rain was forecast.

Q. Did you keep your men off the job that entire day?

A. Immediately after his telephone call I called the chief inspector on the job, informed him of our intention in order to protect Hydro. He agreed that it was a good idea. I called Bob back and informed him that we would have our men off the job.

(Testimony of Paul Revere Gardner, Jr.)

Q. What did you do with the men that you had scheduled to [170] work that day?

A. By the time these arrangements had been completed our crews had left, so we made work for those men in the shop for the balance of the day. On that particular day, incidentally, I had made plans to visit the site to check out certain portions of the work, but because of the circumstances involved, I did not visit the site in order to keep all our vehicles off the job on the day.

Q. Have you now, or are you now, or have you—strike that.

Have you at any time had any work to do at the part of the jobsite shown in the picture which is before you, General Counsel's Exhibit 4, that is, you or your men?

A. We have performed no work at all in the immediate vicinity of this site, although a portion of our contract will involve some work on a pole line in the immediate area, but that work has not been accomplished as yet.

Mr. Weil: I have no further questions of this witness at this time.

Mr. Brundage: I have no questions of this witness. [171]

* * *

LEROY DEVEREAUX

a witness called by and on behalf of the Local Union, International Brotherhood of Electrical Workers, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Brundage:

Q. I wonder if you would give your name and address to the Reporter, Mr. Devereaux?

A. Leroy Devereaux, 15724 Rushford Street, Whittier, California.

Q. Mr. Devereaux, where are you presently employed?

A. International Brotherhood of Electrical Workers, Local Union 11.

Q. And in what capacity are you employed there, Mr. Devereaux?

A. Business representative.

Q. And are you assigned to any particular geographical area as a business representative of Local 11?

A. Yes, District 6 of Local Union 11.

Q. And I wonder if you would indicate the geographical [176] jurisdiction of District 6? Put it another way, what is the geographical area over which you are in charge as the business agent?

A. It is an area that is bounded on the west by Atlantic Boulevard, on the east by the Los Angeles County line, on the south by Rosecrans and Firestone, and on the north by Garvey and the moun-

(Testimony of Leroy Devereaux.)

tains. I don't know what the name of the mountains are to the north.

Q. All right. Now, you are familiar with the job, or a construction work that is taking place on the Kellogg Campus of the California State Polytechnic College? A. Yes.

Q. Does that fall within the geographical jurisdiction over which you have as business agent?

A. Yes.

Q. Are you also familiar with some construction work that is taking place at the Metropolitan State Hospital in Norwalk, California? A. Yes.

Q. Does that fall within the jurisdiction?

A. Yes.

Q. Of which you are business agent?

A. Yes.

Q. Mr. Devereaux, you were present here at the hearings yesterday, and there was testimony with respect to the fact [177] that Local 11 of the IBEW had established a picket line at the Kellogg Campus of the California State Polytechnic College sometime in the middle of October of 1957. Now, did you, Mr. Devereaux, have anything to do with respect to the establishment of the picket line at the Kellogg Campus?

A. Yes, I established the picket line, what we call Cal Poly.

Q. Cal Poly, yes.

A. Yes. On Friday, October 18th.

Q. All right. Now, when you say that you established the picket line on Friday, October 18th, that

(Testimony of Leroy Devereaux.)

is of 1957, of course, will you tell me what you did, Mr. Devereaux, that is to say, did you assign a member of the local union to picket out there?

A. Yes.

Q. And did the union have prepared for him a placard which he should carry?

A. That is right.

Q. And I show you——

First let me have it marked. I would like this marked, Mr. Trial Examiner.

Trial Examiner: That will be Respondent's Exhibit No. 1 for identification.

(Thereupon the document above referred to was marked Respondent's Exhibit No. 1 for identification.) [178]

Q. (By Mr. Brundage): I show you Respondent's Exhibit 1 for identification and ask you to identify that sign? Is that the sign that the picket was given? A. Yes.

Q. And was this sign prepared by Local Union No. 11? A. Yes.

Q. And was there attached to this sign a post, or any kind of handle wherein the man could carry the sign? A. A piece of one by two wood.

Q. All right. With respect to the instructions that you gave to the picket, what did you tell him to do, Mr. Devereaux?

A. Are you referring to Cal Poly?

Q. Cal Poly, yes, sir.

(Testimony of Leroy Devereaux.)

A. The picket at Cal Poly was instructed to stand at the ditch across San Jose Road, next to the fence, and portray this sign. In other words, carry the stick on his shoulder so that anyone who was interested, particularly the people that we were trying to contact here could read the sign.

Q. Now, then, at the time that the picket was placed near the ditch, there were employees of Gardner Electric Company working in the ditch, is that right?

A. That is correct; yes, sir.

Q. Now, the area where the picket was told to stand or walk by you, as I understand it, was not in front of an [179] entrance into the campus, is that correct?

A. No. I mean, yes, it wasn't in front of an entrance to the campus.

Q. It wasn't in front of an entrance to the campus near the ditch? A. Yes.

Q. Now, did employees working on the job site cross through this entrance? A. No.

Q. They did not? A. No.

Q. Now, as I understand it, Mr. Devereaux, there are various types of employees who do work in building construction employed on the campus job, is that right? A. That is right.

Q. Were there carpenters employed there?

A. Yes.

Q. Engineers employed there? A. Yes.

Q. Laborers employed there? A. Yes.

Q. Plumbers employed there? A. Yes.

(Testimony of Leroy Devereaux.)

Q. Any others that come to your mind?

A. Pipe fitters. [180]

Q. Pipe fitters? A. Cement finishers.

Q. Cement finishers.

As a matter of fact, there was another sub-contractor on the job who did electrical work other than Gardner Electric, isn't that right?

A. That is right.

Q. All right. Now, the entrances that these various craftsmen used to go onto the campus, were those—I am sorry, strike that.

You testified that this picket was instructed by you to stand near the ditch, and that there was also an entrance near that ditch which enabled persons to go onto the campus, is that correct?

A. No.

Q. Oh, all right.

A. No, the entrance at the ditch through the fence was to enable the employees that might be working on the ditch to have access to the ditch itself. In other words, where the ditch was that Gardner was working on was completely surrounded by fence, and at this particular ditch location there was an opening in the fence that they had access to this ditch that they were working on.

Q. I see. Now, the various other types of employees that you mentioned, carpenters, pipe fitters, engineers, laborers, [81] and all of the rest, they did not go through this entrance when they went onto the campus to perform work, did they?

A. No, they didn't.

(Testimony of Leroy Devereaux.)

Q. And you did not instruct your picket to go and picket at any of the entrances through which these employees went when they walked onto the campus, is that correct?

A. No, that is right.

Mr. Weil: May we have the time? Was that answering for all time?

Mr. Brundage: Yes, I am talking now—thank you.

Q. I am talking now initially——

A. (Interposing): When this picket was set up.

Q. When this picket line was set up, all right. Now, did you give any instructions to the picket with respect to whether he should tell employees to remain away from work?

A. The instructions we gave all pickets, that is, I gave all pickets concerned was to say nothing to no one. And if in their considered opinion as an emergency arose, arrived rather, that they couldn't handle, by not saying anything, to contact me by telephone.

Q. All right. Now, did you instruct any of your pickets to stop any trucks that might be coming onto the property with respect to making deliveries of materials? A. No.

Q. Did you instruct your pickets to ask the employees of [182] Gardner Electric Company to remain away from work? A. No.

Q. Did you have any conversations with the em-

(Testimony of Leroy Devereaux.)

ployees of Paul Gardner Electric Company prior to the establishment of the picket? A. Yes.

Q. Will you tell us when those conversations took place, and with whom those conversations took place, if you can give me the names, and where those conversations took place?

A. This is in relation to Cal Poly?

Q. In relation to Cal Poly, yes, sir.

A. I had conversation with two employees of Gardner on Thursday, October 17th.

Q. All right.

A. —that were involved with work alongside of the ditch. They were installing conduit that at a later date would be installed in the ditch, and I informed, or I checked them both to find out if they did belong to any union, of any description. They informed me that they didn't. And I asked them if they would like to join the IBEW, Local Union 11, and they said they had thought about it, but they didn't exactly know what to think at that time. So I advised them that the following day there would be a picket line set up on that ditch that they were working, if at any time they decided to join the IBEW we would appreciate it, and I gave them my card, [183] and also told them they could contact me through the picket by advising him that they wanted to see me. [184]

• • •

Q. Now, did you, yourself, have any conversations with employees of other contractors or sub-

(Testimony of Leroy Devereaux.)

contractors on the job with respect to remaining away from the job? A. No.

Q. Do you know of your own knowledge?

A. With one exception, let me clarify that, with one exception.

Q. All right.

A. I did discuss with a Mr. McClary, I believe it is, with Hydro, that was the only exception.

Q. I am talking about employees.

A. Employees, O.K. I didn't know whether he was an employee or not.

Q. You did not have any conversations with any employees with respect to remaining away from the job? A. No; no.

Q. Now, do you know from your own knowledge whether any of your pickets had any conversations, and I am now confining this to the Kellogg job, whether any of your pickets had any conversations with any employees with respect to remaining away from the job?

A. They were instructed not to, and as far as I know they [185] didn't have any [186] conversations.

* * *

Q. All right. Now, did you have occasion in your capacity as business agent to go out to the job from time to time to observe what was taking place, Mr. Devereaux? A. Yes.

Q. And, I take it, you were out the first day when the picket was established? A. Right.

(Testimony of Leroy Devereaux.)

Q. On that particular day, Mr. Devereaux, do you know from your own knowledge, or rather from your observation, whether employees of other employers remained away from their work, or whether they continued to work?

A. I know of no employees, to my personal knowledge, that were off of the job because of the picket on the ditch.

Q. Well, let me put the question to you this way, Mr. Devereaux, did you observe employees going to work and working on the project despite the fact that there was a picket there?

A. Yes.

Q. And was that true of the various groups of craftsmen that you had reference to?

A. Yes.

Q. Carpenters? A. That is right.

Q. Engineers? A. Yes. [187]

Q. Laborers? A. Yes.

Q. Gardner, I don't mean Paul Gardner employees, but I understand there were some employees out there engaged in landscape gardening?

A. Yes, that is correct.

Q. They continued to work? A. Yes.

Q. The picket remained there, I think you said now until November 18th. Did you have just one picket at a time? A. One at a time.

Q. All right. Now, on or about November 18th, was there any change with respect to the picketing?

A. On November 18th we removed the picket from that location, and set up two pickets.

(Testimony of Leroy Devereaux.)

Q. Where did you place these pickets?

A. One picket was placed at the main entrance off of San Bernardino Freeway into Cal Poly campus, and the other picket was located on Old Valley Boulevard entrance to Cal Poly.

Q. All right. Now, will you tell me, Mr. Devereaux, why you changed the location of where the picketing took place?

A. The reason for changing the location of the picket was because of the fact that prior to November 18th, Paul Gardner employees had changed location as far as their work was [188] concerned. They had started to work up into what we call the middle area of the campus, and to verify it we went up and talked to the fellows on the job that were working, and there wasn't any other way in the world we could set a picket up at that location because there wasn't any location to set up, just like being out in the middle of a field. So, for that reason, the only thing we could do was set a picket up at the nearest accessible place that wouldn't interfere with the students and normal operations of the college itself.

Q. Then, do I understand, Mr. Devereaux, your testimony to be that when the employees of Gardner moved their location, you attempted to place your pickets in the closest proximity that you could to where the work was being performed by Gardner employees, is that right?

A. That is right.

Q. Now, when you placed the pickets at the

(Testimony of Leroy Devereaux.)

entrances, Mr. Devereaux, were you there on that particular day? A. Yes.

* * *

Q. When your pickets were moved to the other entrances, did you change your instructions with respect to whether they should ask employees to remain away from the job? A. No. [189]

Q. Did you reiterate your instructions with respect to their not saying anything to any employees?

A. Yes.

Q. Did you, yourself, when you were at these entrances, ask any employees to remain away from the job? A. No.

Q. Do you know from your own knowledge whether any of the pickets asked any of the employees to remain away from the job?

A. From what they told me, they didn't ask any of them at all.

Q. All right. And, I take it you know of no cases where the pickets did ask the employees to remain away from the job? A. No, I don't.

Q. Now, on the days that you placed the picket at the entrances, I think you have testified that you were there? A. Yes.

Q. Did employees remain away from the job and observe the picket line, or were there employees who continued to go to work on the project?

A. On the day I established the picket?

Q. Yes, sir, now I am talking now when the picket was moved to the two entrances?

(Testimony of Leroy Devereaux.)

A. The picket was moved in the middle of the day.

Q. All right. [190]

A. Of course, the men were working on the job already all over the job, and that was one of the reasons that we moved in the middle of the day.

Q. Because Gardner's employees were working?

A. Gardner employees and the rest of the trades were already on the job.

Q. Well, yes. But now, when you moved the pickets into the proximity of Gardner employees, did all of the, did the employees of the other crafts walk off the job?

A. Not to my knowledge, I don't know of any that walked off at that time.

Q. All right.

A. I was there at the gate, I don't remember any.

Q. All right. Now, as the employees returned to work, were there employees who walked through the picket line?

A. Yes.

Q. There were?

A. Yes.

Q. And were there some employees who did not go through the picket line?

A. Yes. [191]

* * *

Q. Now, as I understand it, Mr. Devereaux, employees of these various crafts continued to work on the job even though there was a picket there?

A. Yes. [195]

* * *

(Testimony of Leroy Devereaux.)

Q. (By Mr. Brundage): And there were men from these various crafts who went through the line and continued to work? A. Yes.

Q. Now, how long did this picket sign continue from November 18th on?

A. It was set up on November 18th, and was removed November 21st at 11:00 a.m.

Q. Now, Mr. Devereaux, was a different type of sign employed after that? A. Yes.

Mr. Brundage: And, first, I wonder, Mr. Trial Examiner, if we may ask that Respondent's Exhibit 1, No. 1 for identification, be admitted in evidence.

Trial Examiner: All right. Without objection——

Mr. Weil: No objection.

Trial Examiner: Respondent's Exhibit 1 for identification is received in evidence.

(The document heretofore marked Respondent's Exhibit No. 1 for identification was received in evidence.)

Q. (By Mr. Brundage): Now, I show you what I would like to have marked as Respondent's Exhibit No. 2, for identification. [196]

(Thereupon the document above referred to was marked Respondent's Exhibit No. 2 for identification.)

Q. (By Mr. Brundage): Now, Mr. Devereaux,

(Testimony of Leroy Devereaux.)

I ask you if this sign was—first, I ask you to identify it, what is this here?

A. This is a sign that was erected at the two entrances to Cal Poly that I mentioned a while ago off the freeway, and off the Valley Boulevard.

Q. This was a sign that was substituted for the sign that the union had existing prior thereto?

A. That is right. [197]

* * *

Q. (By Mr. Brundage): Why was the second sign substituted?

Mr. Weil: Object, irrelevant and immaterial.

Trial Examiner: I will overrule the objection, you may answer.

The Witness: The reason for that was because we thought that possibly that this was causing a little bit of confusion at the gates.

Q. (By Mr. Brundage): Let me ask you the question, Mr. Devereaux, was it intended by the union when it placed the [198] first sign, Respondent's Exhibit No. 1, that employees other than Gardner Electric Company, or, let me rephrase that question.

Was it the intention when Respondent's Exhibit No. 1 were placed at the gate that employees of employers other than Gardner Electric Company should remain away from the job? A. No.

Q. And, as I understand it, Mr. Devereaux, had it been the intention of the union to do that in the first instance they would have placed the original

(Testimony of Leroy Devereaux.)

picket sign at entrances through which the other craftsmen went to work, is that correct?

A. That is right, yes.

Q. And this was not done originally, is that right?

A. That is right.

Q. And the only reason that the picket lines were moved because the work of Gardner employees changed, is that right?

A. That is correct.

Q. As I understand it, as I understood your testimony, Mr. Devereaux, subsequent to the placing of the pickets at the main entrances of the gate, some employees remained away from the job of the other crafts, and some did not, is that correct with respect to your testimony?

A. Let us have that again.

Q. All right. When on November 18th the pickets were [199] placed at the two gates that you mentioned, insofar as the other crafts were concerned, some employees observed that picket line, and some did not observe the picket line, is that correct, speaking now of employees of other crafts?

A. Some did and some didn't.

Q. Yes, sir.

A. That is from the reports that I received. I didn't see any that didn't show up, all I saw was the ones that did show up.

Q. All right. You saw the ones that went to work?

A. That is right. [200]

(Testimony of Leroy Devereaux.)

Q. (By Mr. Brundage): Now, as I understand it, and I think the record shows this, during the week did some of the employees remain away from the work, other employees other than Gardner Electric?

A. Yes.

Q. Do I understand your testimony to be that that is why the union changed the sign so there could be no question that the union was not attempting to induce employees of other employers to remain away from the job, is that right?

A. Yes. [201]

* * *

Q. All right. Now, then, will you tell us who said what, as best you recollect?

A. At the time McClary asked if there is anything that he could do, or anything that we could do in respect to removing the pickets for the benefit of his operation. And I advised him that as far as the pickets were concerned, that I intended to have a picket there to try and organize Gardner's employees as long as they were on the project. And he asked me if I could remove them long enough for him to get his work done and come back with them again, and I told him, no, that we didn't operate that way, that we were trying to organize their employees, and trying to have someone there that they could contact if they felt like joining the IBEW. Then he talked to Ed Rogers, the plumbers business agent, and asked him what he could do.

* * *

(Testimony of Leroy Devereaux.)

A. And he talked to Ed Rogers, the Plumbers' business agent, and asked Ed what he could do about the job in relation to his work, and Ed says, "I can't do a thing in the world about it, the electricians have the picket line set up to organize Gardner's employees, and that is it."

Q. That was the totality of the conversation, as you [205] recall it?

A. Except, of course, that McClary asked me along with Rogers if we could do something about his people in respect to picket line, and we told him we didn't have any concern with his people one way or another, they could work or not work, that was their prerogative, and I had no bearing on them whatsoever.

Q. There was nothing else in the conversation?

A. Yes, there was. When Clary suggested that fact that he was more or less caught in the middle, so to speak, because he had this job that was concerned with Gardner's operation also in the same ditch, and Rogers advised him that this wasn't something that just happened yesterday, he had known about this a long time ago, about the possibility of having union men and non-union men working in the same ditch at the same time. That was between McClary and Rogers, but I observed it, I overheard it. [206]

* * *

The Witness: Yes, there is one item here that Clary was talking to Rogers about, about the—you want me to go ahead and explain this?

(Testimony of Leroy Devereaux.)

Mr. Brundage: Sure; sure.

The Witness: About the advisability of having his men sneak in after 4:30 when the picket left.

Mr. Brundage: Was this McClary asking Rogers?

The Witness: That is right.

Mr. Hildreth: In your presence?

The Witness: That is right.

Mr. Hildreth: Continue.

The Witness: And he was advised by Rogers, as far as he was concerned, the picket was a picket, that is all there was to it, there wasn't any time on it because of the fact [207] that it was just a picket, I mean, there is no set time on it, whenever Gardner's employees were there, that is when it established.

* * *

Q. (By Mr. Brundage): All right. Now, Mr. Devereaux, directing your attention now to the Norwalk job, did you similarly have charge of the placing of the picket there? A. Yes.

Q. And will you tell me when the picket was placed on the Norwalk job? [208]

A. I can't by looking at the notes. I don't know the exact date by memory.

Q. I don't think there is any real question about this, at least I think we are in a substantial agreement with the testimony that was adduced by counsel with respect to the time. And is it right that a picket line was placed there on or about November 12, 1957? A. Yes; yes.

(Testimony of Leroy Devereaux.)

Q. All right. Now, will you tell me, did you, yourself, take the picket out and show him where he was to picket? A. Yes.

Q. All right. Will you tell us where that was?

A. The picket was advised to walk the picket line at the designated construction gate entrance to the project at Norwalk Metropolitan Hospital on Bloomfield.

Q. All right. Now, will you tell us why you picketed at the gate that you did?

A. Because I was advised by, what's his name, this fellow that was in here yesterday, Lesch, the construction superintendent, that that was a designated construction gate to be used by all construction workers for all construction work on the job.

Q. I think Mr. Lesch testified yesterday that this particular access road where the picket line was placed, the closest road to where the construction in which Gardner [209] Electric employees were engaging, is that correct?

A. It was the closest road, yes.

Q. All right. Now, then, was the same placard used that appears as Respondent's Exhibit No. 1?

A. Yes.

Q. And was there one picket?

A. One picket, yes.

Q. And what instructions did you give the picket on the Norwalk job? [210]

* * *

Q. (By Mr. Hildreth): Well, getting back to

(Testimony of Leroy Devereaux.)

the original date that the picket was established, was it your intention not to bother any other union employees from working on that job?

A. Was it my intention not to bother any employees with this picket?

Q. To not to prohibit them from working?

A. That is right.

Q. That was your intention?

A. To not stop them from working, that is right.

Q. To whom did you convey that information?

A. To whom did I convey it to?

Q. Yes.

Mr. Brundage: Just a moment. I am going to object to that.

Q. (By Mr. Hildreth): Did you convey that information?

Trial Examiner: Wait a minute. Let us not both talk at once. You are both lawyers. When one is talking, the other doesn't interrupt. Now make your Statement.

Mr. Brundage: All right, sir. I have an objection to the [229] question on the grounds that it is too broad in its nature. It doesn't lay any foundation. If counsel wants to ask him if he talked to specific persons, to employees, I think he is entitled to ask him that question, but to ask him to whom did you talk about this subject, which may go into anyone from his wife to his lawyer, to his boss, to anyone else, seems to be pretty broad in scope.

(Testimony of Leroy Devereaux.)

Trial Examiner: I don't know that the question was that broad.

Mr. Hildreth: I will reframe it, Mr. Trial Examiner.

Trial Examiner: All right.

Q. (By Mr. Hildreth): Did you convey that information to anyone, and my question is to be answered yes or no?

A. I don't even know what the question is now.

Q. Did you convey the information that it was not the intention of Local Union 11 to prohibit any other union employees from working to anyone?

A. Yes.

Q. And did you convey that to any union officials? A. Yes.

Q. To whom?

A. Well, this Plumbers' business agent for one.

Q. I see. A. Rogers.

Q. And did you convey that information to Mr. McClary? [230] A. I sure did.

Q. What did you say to him at that time?

A. I told McClary that the meeting we had with him, that it wasn't our intention to keep anyone from working on the job, or asking anyone to leave the job. [231]

* * *

Trial Examiner: Was the sole purpose of the picket out there shown in General Counsel's Exhibit 4-B to contact the Gardner employees?

The Witness: No, the purpose of the picket line

(Testimony of Leroy Devereaux.)

there was to organize them, by that I mean have the picket set up in such a way that these men working with Gardner recognized it as a union line, or man that they could contact if they wanted to get in touch with me.

Q. (By Mr. Hildreth): Did you tell Mr. McClary that you regarded it as a 24-hour picket line?

A. Because it could be subject to being put up, oh, any time during the 24 hours if Gardner employees were there to work.

Q. When Mr. McClary requested permission to sneak in after 4:30 when the picket left, you told him that you regarded it as a 24-hour picket line, didn't you? A. That is right. [234]

Q. You knew that Gardner didn't have any employees working after 4:30, didn't you?

A. No, I didn't.

Q. Did you make any attempt to find out when Mr. Gardner's employees were working?

A. Did we make any attempt to find out when they were working?

Q. That is correct.

A. No, other than check the job that they were working and so on to see if they were working.

Q. Weren't you advised that Mr. Gardner's employees weren't going to work on the 31st of October, 1957?

A. Was I advised that they weren't going to work?

Q. Yes. A. No.

(Testimony of Leroy Devereaux.)

Q. Were you advised that they were not going to work on November 1st, 1957?

A. No, I was never advised that they weren't going to work by anyone.

Q. The same is true for November 4, 5 and November 6? A. Any dates; any dates. [235]

* * *

Q. And give us the conversation on the phone that you recall. [245]

A. In effect I believe that at that time Mr. McClary asked me if he could go in there and go to work.

Q. What did you say?

A. I said sure, as far as I am concerned, he could. On the telephone I am talking about now.

Q. And what did he say?

A. I don't know now. I can't remember what he said verbatim, word for word, or anything of that type, except the fact that there was a picket there. And I advised him the picket didn't mean anything as far as he was concerned, or as far as I was concerned it was strictly to organize the employee of Gardner, that was all. In fact, what kind of surprised me in a way about the whole thing was the fact that they had never stopped work, Hydro hadn't.

Q. Why did that surprise you?

A. Surprised that he would call to me and advise me that the picket had something to do [246] with it.

* * *

Mr. Brundage: As a result of the off-the-record discussion, it is my understanding that the parties would stipulate to a procedure wherein respondents will read into the record what appears on Respondent's Exhibit No. 2, and then we will request leave to withdraw Respondent's Exhibit No. 2.

Trial Examiner: All right.

Mr. Brundage: This appears on a sign that is 30 by 48 inches, and the following appears on the sign:

"Notice to Union Employees: Gardner Electric is non-union. Local Union 11, IBEW Electricians, is trying to organize Gardner Employees. This is not a picket line, union employees continue to [259] work."

* * *

Mr. Brundage: Respondent's Exhibit No. 1 reads as follows:

"To Employees: Paul Gardner Electric Company is non-union. Join LU 11-IBEW-AFL-CIO. This is an organizational picket line."

* * *

Received February 12, 1958. [260]

United States Court of Appeals
for the Ninth Circuit

No. 16392

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL UNION
No. 11, AFL-CIO,
Respondent.

CERTIFICATE OF THE NATIONAL
LABOR RELATIONS BOARD

The National Labor Relations Board, by its Executive Secretary, duly authorized by Section 102.92, Rules and Regulations of the National Labor Relations Board, Series 7, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record of a consolidated proceeding had before said Board, and known upon its records as Case Nos. 21-CC-281 and 21-CC-282. Such transcript includes the pleadings and testimony and evidence upon which the order of the Board in said proceeding was entered, and includes also the findings and order of the Board.

Said documents attached hereto are as follows:

1. Stenographic transcript of testimony taken before Trial Examiner Wallace E. Royster on Janu-

ary 27 and 28, 1958, together with all exhibits introduced in evidence.

2. Copy of Intermediate Report and Recommended Order issued by Trial Examiner Royster on March 31, 1958 (annexed to item 4, hereof).

3. Respondents' Exceptions to the Intermediate Report received April 23, 1958.

4. Copy of Decision and Order issued by the National Labor Relations Board on August 13, 1958.

In Testimony Whereof, the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the city of Washington, District of Columbia, this 13th day of April, 1959.

[Seal] /s/ FRANK M. KLEILER,
Executive Secretary, National
Labor Relations Board.

[Endorsed]: No. 16392. United States Court of Appeals for the Ninth Circuit. National Labor Relations Board, Petitioner, vs. International Brotherhood of Electrical Workers, Local Union No. 11, AFL-CIO, Appellee. Transcript of Record. Petition to Enforce an Order of the National Labor Relations Board.

Filed April 14, 1959.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

[Title of Court of Appeals and Cause.]

PETITION FOR ENFORCEMENT OF AN
ORDER OF THE NATIONAL LABOR RE-
LATIONS BOARD

To the Honorable, the Judges of the United States
Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151, et seq., as amended by 72 Stat. 945), hereinafter called the Act, respectfully petitions this Court for the enforcement of its order against Respondent, International Brotherhood of Electrical Workers, Local Union No. 11, AFL-CIO, its officers, representatives and agents.

The consolidated proceeding resulting in said order is known upon the records of the Board as Case Nos. 21-CC-281 and 21-CC-282.

In support of this petition the Board respectfully shows:

(1) Respondent is a labor organization engaged in promoting and protecting the interests of its members in the State of California, within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act, as amended.

(2) Upon due proceedings had before the Board in said matter, the Board on August 13, 1958, duly stated its findings of fact and conclusions of law,

and issued an Order directed to the Respondent, its officers, representatives and agents. On the same date the Board's Decision and Order was served upon Respondent by sending a copy thereof post-paid, bearing Government frank, by registered mail, to Respondent's counsel.

(3) Pursuant to Section 10 (e) of the National Labor Relations Act, as amended, the Board is certifying and filing with this Court a transcript of the entire record of the proceeding before the Board upon which the said Order was entered, which transcript includes the pleadings, testimony and evidence, findings of fact, conclusions of law, and the Order of the Board sought to be enforced.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon Respondent and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon the Order made thereupon a decree enforcing in whole said Order of the Board and requiring Respondent, its officers, representatives, and agents to comply therewith.

/s/ THOMAS J. McDERMOTT,
Association General Counsel, National Labor Relations Board.

Dated at Washington, D. C., this 4th day of March, 1959.

[Endorsed]: Filed March 6, 1959.

[Title of Court of Appeals and Cause.]

ANSWER TO PETITION FOR ENFORCE-
MENT OF AN ORDER OF THE NA-
TIONAL LABOR RELATIONS BOARD

To the Honorable, the Judges of the United States
Court of Appeals for the Ninth Circuit:

Respondent International Brotherhood of Elec-
trical Workers, Local Union No. 11, AFL-CIO, an-
swering the Petition for Enforcement of an Order
of the National Labor Relations Board **entered in**
said proceeding of the Board known as Case Nos.
21-CC-281 and 21-CC-282, respectfully shows as
follows:

1. Respondent admits the allegations of para-
graph (1) of the Petition.

2. Answering the allegations of paragraph (2)
of the Petition, Respondent admits the allegations
contained therein, but in addition thereto, alleges
that the Order of the National Labor Relations
Board was based on erroneous findings and fact
and was not based on substantial evidence in the
record for sustaining the finding that Respondent
engaged in unfair labor practices within the mean-
ing of Section 8 (b) (4) (A) of the Labor Man-
agement Relations Act of 1947, or any other unfair
labor practices within the meaning of said Act.

Respondent further alleges that the National
Labor Relations Board erred in its Conclusions of

Law in that it misinterpreted and misapplied the provisions of the Labor Management Relations Act of 1947 in its Findings and Conclusions that Respondent International Brotherhood of Electrical Workers, Local Union No. 11, engaged in unfair labor practices within the meaning of Section 8 (b) (4) (A) of the Labor Management Relations Act of 1947, or any other unfair labor practices within the meaning of the Labor Management Relations Act of 1947.

3. Respondent admits the allegations of paragraph (3) of the Petition.

Wherefore, Respondent prays that this Court make and enter its Decree dismissing this proceeding.

TOBRINER, LAZARUS, BRUNDAGE & NEY-
HART,

By /s/ ALBERT BRUNDAGE,
Attorneys for Respondent.

Dated at Los Angeles, California, this 19th day
of March, 1959.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 21, 1959.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH
PETITIONER INTENDS TO RELY

In this proceeding, the petitioner, National Labor Relations Board, will urge and rely upon the following point:

1. The Board's finding that respondent violated Section 8 (b) (4) (A) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 151, et seq.), by inducing and encouraging the employees of neutral employers to engage in a concerted refusal to perform services for their several employers, with an object of requiring the State of California, other employers and persons to cease doing business with Paul Gardner, or Paul Gardner Corporation is supported by substantial evidence on the record as a whole.

MARCEL MALLET-PREVOST,
Assistant General Counsel, National Labor Relations Board.

Washington, D. C., April 13, 1959.

[Endorsed]: Filed April 14, 1959.



No. 16392

**In the United States Court of Appeals
for the Ninth Circuit**

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

**INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
LOCAL UNION No. 11, AFL-CIO, RESPONDENT**

**ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL
LABOR RELATIONS BOARD**

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STUART ROTHMAN,

General Counsel,

THOMAS J. McDERMOTT,

Associate General Counsel,

MARCEL MALLET-PREVOST,

Assistant General Counsel,

DUANE B. BEESON,

CHRISTOPHER J. HOEY,

Attorneys,

National Labor Relations Board.

FILED

SEP 23 1959

PAUL P. O'BRIEN, CLERK

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In the United States Court of Appeals for the Ninth Circuit

No. 16392

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
LOCAL UNION No. 11, AFL-CIO, RESPONDENT

*ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL
LABOR RELATIONS BOARD*

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon petition of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. Sec. 151 *et seq.*),¹ for enforcement of the Board's order issued on August 13, 1958, against the International Brotherhood of Electrical Workers, Local Union No. 11, AFL-CIO, hereafter called the Union. The Board's Decision and Order are reported at 121 NLRB No. 65 (R. 17-20).² This Court has jurisdiction of the proceed-

¹ The relevant provisions of the Act are set forth in the Appendix to this brief, *infra*, pp. 19-20.

² References to the printed record are designated "R". References preceding a semicolon are to the Board's findings; those following the semicolon are to the supporting evidence.

ing, the unfair labor practices having occurred near Ontario, California.³

STATEMENT OF THE CASE

In brief, the Board found that the Union, in the course of its efforts to organize the employees of Paul Gardner Corporation, violated Section 8(b)(4)(A) of the Act by its picketing activities at construction sites where employees of Gardner and other contractors were at work. The picketing was found to have been directed at the employees of such other contractors for the purpose of inducing work stoppages by them in order to force the State of California and other employers and persons to cease doing business with

³ Paul Gardner Corporation, whose business primarily was affected by the Union's unfair labor practices, performed services and furnished supplies in 1957 valued in excess of \$100,000 for interstate highways constructed by the State of California and for various interstate businesses (R. 5, 6, n. 1). Although not contesting the sufficiency of this amount of interstate business to establish the Board's jurisdiction under the Act, the Union contended before the Board that the evidence in this respect related to a period in which Paul Gardner conducted his business as an individual proprietor, and therefore did not warrant the assertion of the Board's jurisdiction over the corporation. Gardner transformed his business into a corporation from a proprietorship during the same period that the unfair labor practices occurred, so that the available interstate commerce data necessarily covered the pre-corporation period of the business (R. 22, 27). Since the business continued in the same manner notwithstanding the change in form, the 1957 operations are plainly relevant to establish the Board's jurisdiction in this case. .

The Union's further contention before the Board that, as a discretionary matter, the Board should have declined to assert jurisdiction is precluded by this Court's decisions in *N.L.R.B. v. Daboll*, 216 F. 2d 143, 144 (C.A. 9), certiorari denied, 348 U.S. 917, and *N.L.R.B. v. Jones Lumber Co.*, 245 F. 2d 388, 390-391 (C.A. 9).

Gardner. The underlying facts upon which these findings rest may be summarized as follows:

I. The Board's findings of fact

A. The nature of Gardner's business

Paul Gardner Corporation is an electrical contractor, and maintains an office and warehouse in Ontario, California, as its principal place of business (R. 5; 28-29). Its employees report there for work daily before 8:00 a.m., at which time they receive their job assignments for that day (R. 9; 31). They obtain the tools and equipment they will need on their assignments and are then driven in company trucks to the various job sites where Gardner has contracted to perform electrical services (R. 9; 34). At the end of the work day they return to the warehouse in Ontario where time cards for each day are made out (R. 9; 32). In the normal course of business the employees do not come back to the warehouse during the work day, except for occasions when additional equipment is required at a job site (R. 35).

B. The picketing of the construction work at California State Polytechnic College

On October 1, 1957, Gardner began work on electrical installations on the campus of California State Polytechnic College, near Pomona, California (R. 7; 23). The job called for laying conduit in a pipeline ditch which was being dug by employees of Hydro Company, a general engineering contractor (R. 7; 24, 47). On October 17, Leroy Devereaux, the Union's business agent, arrived at the construction area and asked two of Gardner's employees whether

they belonged to a union (R. 70). Upon receiving a negative answer, Devereaux invited the men to join the Union, and "advised them that the following day there would be a picket line set upon on that ditch that they were working, if at any time they decided to join the [Union] we would appreciate it * * *" (R. 70).

In accordance with Devereaux's statement, a Union picket appeared at the site on the next day, October 18 (R. 7; 66-67). The picket patrolled an area where the construction ditch intersected with a campus road, and carried a sign which read (R. 7; 66-67, 87):

To employees: Paul Gardner Electric Company is non-union. Join LU 11-IBEW-AFL-CIO. This is an organizational picket line.

The picket was instructed by the Union "to say nothing to no one," and if any question arose that he "couldn't handle by not saying anything, to contact [Devereaux] by telephone" (R. 69).

Upon the picket's arrival, the employees of Hydro Company, who were union members, refused to work on the pipeline at any point along the ditch from which the picketing was visible (R. 7; 48). Since a substantial section of the ditch was in view of the picket, Hydro's progress in laying pipe was seriously impeded (R. 7; 48, 50-51). In the first week in November, 1957, Robert McClary, a Hydro Company partner, inquired of Union agent Devereaux whether Hydro employees could work unmolested on weekends or in the evenings, when Gardner's employees were not on the job (R. 7-8; 48-49). Devereaux, however, responded by stating that it was a 24 hour picket line, and that if Hydro employees worked at such

times McClary "knew what would happen" (R. 8; 49, 85). Devereaux also told McClary that Hydro was not being picketed, but that he considered any "part of [the] trench which was to be used by Paul Gardner for conduit unfair:" (R. 49). The business agent of the Plumbers Union, which represented Hydro's employees, was also present at the time, and told McClary that "as far as he was concerned, the picket was a picket, that * * * there is no time set on it * * *'" (R. 81).

On three separate days during the picketing, McClary requested Gardner to withdraw his employees to enable Hydro to finish work in the vicinity of the picketing, and on each occasion Gardner complied (R. 8; 50, 62-63). Even though none of Gardner's employees were on the job on these occasions the picketing continued (R. 8; 50). In view of the absence of Gardner's employees McClary requested the Union steward working for Hydro to authorize Hydro's employees to make a tie-in to the main water lines, which would secure the new pipeline against damage in the event of rain before the completion of the job (R. 52). The steward in turn called the union hall, but reported that "under no circumstances" could the tie-in be made (*ibid.*).

Some time in the middle of November, Gardner substantially completed laying the conduit in the area of the picketing and transferred most of its operations to another part of the campus. Accordingly, on November 18, the Union ceased its picketing at the pipeline ditch and, unable to place pickets on a public street at the new work area, the Union commenced

picketing at the two main gates of the campus (R. 8; 72-73). Different signs were used at the new picketing site. These read (R. 76-77, 87):

Notice to Union Employees: Gardner Electric is non-union. Local Union 11, IBEW Electricians, is trying to organize Gardner Employees. This is not a picket line, union employees continue to work.

The closer of the two gates picketed was approximately one half to three quarters of a mile away from where Gardner's men were working (R. 38). When the pickets took these positions, many employees of other contractors at work on the campus refused to cross the picket line and construction work on the campus was "largely shut down" (R. 8; 53-55). Picketing finally stopped altogether on November 21, 1957 (R. 8; 76).

C. The picketing at the Metropolitan State Hospital

During the same period that Gardner was completing work on the California State Polytechnic College, its employees were also installing electrical service at the Metropolitan State Hospital in Norwalk, pursuant to a contract with the State of California (R. 8; 22-23). Beginning on November 12, 1957, and for a period of 9 days thereafter, the Union placed a picket at the employee entrance to the hospital (R. 8-9; 39-40). The picket sign carried the same legend as that used from October 18 to November 18 at the pipeline ditch (R. 82, 87, see p. 4, *supra*). Throughout the period of the picketing most of the employees working for other contractors at the hospital project refused to cross the picket line (R. 8-9; 39, 42). The picketing,

as well as the work stoppage, continued even during a day in this period in which Gardner's employees were not on the job (R. 40-41). The picket was removed on November 21, and on the following day the employees of other contractors returned to their work (R. 39, 42).

II. The Board's conclusions and order

Upon the foregoing facts and the entire record, the Board concluded that the Union violated Section 8(b)(4)(A) of the Act by inducing and encouraging the employees of contractors other than Gardner to engage in work stoppages, with an object of forcing or requiring the State of California and other employers and persons to cease doing business with Gardner.

The Board's order (R. 18-20) requires the Union to cease and desist from engaging in the unfair labor practices found, and to post the appropriate notices.

SUMMARY OF ARGUMENT

The ultimate question in applying Section 8(b)(4)(A) to situations where picketing is carried on at the place of business of employers who are neutral to the labor dispute, but at a time when employees of the employer primarily involved are present to perform work, is the purpose of the picketing. If the picketing union intends only to confine its activity to the primary employees and employer, no violation occurs; if a purpose is to induce neutral employees to engage in work stoppages, and thereby cause a disruption of business relations between the primary and neutral employers, the violation is established. Determina-

tion of the picketing union's purpose is an evidentiary question. It turns upon a consideration of all the circumstances that fairly bear upon whether the union conducts the picketing "with restraint consistent with the right of neutral employers to remain uninvolved in the dispute," or whether the union means to put additional economic pressure upon the primary employer through the involvement of neutrals. *Retail Fruit & Vegetable Clerks v. N.L.R.B.*, 249 F.2d 591, 599 (C.A. 9).

The Board's conclusion that the picketing in the instant case was carried on with an unlawful secondary purpose is fully supported by the following circumstances:

- 1) The picketing occurred on occasion at times when none of Gardner's employees was present. Such picketing was not only unlawful of itself, since the only justification for picketing away from the primary employer's place of business is the presence of his employees, but reflects an overall disposition to reach neutral employees irrespective of whether Gardner's employees were also in the area of the picketing.

- 2) Gardner's warehouse in Ontario was available to the Union as a place for picketing where it could reach the primary employees when they reported to and from work daily. The Union's decision to picket at common work sites rather than at Gardner's warehouse evinces a secondary purpose.

- 3) The Union's business agent made clear in his conversation with Hydro Company's partner, a neutral in the dispute, that the picketing would continue

so long as Hydro's employees were at work whether or not Gardner's employees were on the construction situs.

4) The legend on the picket sign used during the major part of the picketing did not make clear to neutral employees that they were not being requested to honor the picket line.

5) The Union made no attempt, although the circumstances called for clarification, to inform neutral employees that no appeal to them was being made by the picket line.

6) Work stoppages by neutral employees in fact resulted from the picketing. In the circumstances of this case, such stoppages were foreseeable, and in the absence of any steps taken by the Union to avert them, indicate a purpose that they were intended.

In combination, the foregoing considerations fully establish the secondary, and therefore unlawful purpose of the Union's picketing in this case.

ARGUMENT

Substantial evidence supports the Board's finding that the Union's picketing at the construction sites violated Section 8(b)(4)(A) of the Act

A. The controlling principles

Section 8(b)(4)(A) of the Act, so far as relevant here, provides that it shall be an unfair labor practice for a union or its agents—

* * * to engage in, or to induce or encourage the employees of any employer to engage in, a strike or concerted refusal in the course of their employment * * * to perform any serv-

ices, where an object thereof is: (A) forcing or requiring * * * any employer or other person * * * to cease doing business with any other person.

This Section spells out two prerequisites for the finding of a violation. First, the labor organization must be found to have engaged in, or to have induced the employees of an employer to engage in, a strike or concerted refusal in the course of their employment to perform services. Second, it must be found that "an object" of that conduct is to require the cessation of business relations between the employer and any other person.⁴

The applicability of the Section is relatively simple where a union engages in picketing at a place where the only employees at work are employed by an employer who is entirely neutral to the dispute which prompts the picketing. Such activity, standing by itself, can only be designed to induce work stoppages by such neutral employees and thereby force a cessation of business between their employers and the employer primarily involved in the labor dispute, all of which it is the purpose of Section 8(b)(4)(A) to forbid. See, e.g., *I.B.E.W. Local 501 v. N.L.R.B.*, 341 U.S. 694, 696-697, 699-700; *Printing Specialties Union v. LeBaron*, 171 F. 2d 331 (C.A. 9), certiorari denied 336 U.S. 949. On the other hand, it is similarly well settled that Congress did not mean by Section

⁴ The fact that the conduct may also have other and legitimate objects does not preclude the finding of a Section 8(b)(4)(A) violation. *N.L.R.B. v. Denver Building & Construction Trades Council*, 341 U.S. 675, 689.

8(b)(4)(A) to proscribe traditional primary picketing at the place of business of the employer directly involved in the labor dispute. See *Retail Fruit & Vegetable Clerks v. N.L.R.B.*, 249 F. 2d 591, 594, 599 (C.A. 9); *Local 618, Automotive Union v. N.L.R.B.*, 249 F. 2d 332 (C.A. 8). The treatment of these extreme situations under this provision reflects the accommodation which Congress intended to make between the “dual * * * objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in private labor disputes and of shielding unoffending employers and others from pressures in controversies not their own.” *N.L.R.B. v. Denver Building & Construction Trades Council*, 341 U.S. 675, 692.

Where the picketing occurs at a situs where employees of both the primary employer and of other employers are at work, as with the major part of the picketing in the instant case, the problem is more difficult. This Court has dealt with such a problem in *Retail Fruit & Vegetable Clerks v. N.L.R.B.*, 249 F. 2d 591, and as is there made clear, the inquiry in this kind of case is to the purpose of the picketing. 249 F. 2d at 597–599. See also *N.L.R.B. v. Laundry Drivers Local 928*, 262 F. 2d 617, 619 (C.A. 9). If the picketing is directed, even in part (see n. 4, *supra*) at the involvement of neutral employees through work stoppages, and of their employers through the cessation of business with other persons, the violation is established. To be free from the proscription of Section 8(b)(4)(A), picketing at a common work situs must be conducted “with restraint

consistent with the right of neutral employers to remain uninvolved in the dispute.” *Retail Fruit & Vegetable Clerks* case, *supra*, 249 F. 2d at 599.

This question is essentially evidentiary. Its resolution turns upon a consideration of all the circumstances that fairly bear upon whether the picketing union meant to confine its activity to the primary employees and employer, or meant to put additional economic pressure upon the primary employer through the involvement of neutrals. See *N.L.R.B. v. Laundry Drivers Local 928*, 262 F. 2d 617, 619. See also, *N.L.R.B. v. Associated Musicians*, 226 F. 2d 900, 904 (C.A. 2), certiorari denied 351 U.S. 962; *N.L.R.B. v. Truck Drivers Local 728*, 228 F. 2d 791, 796–797 (C.A. 5). We turn, then, to the evidence in the instant case, and show that the record fully supports the Board’s conclusion that the Union’s picketing was directed at the intercession of neutrals in the primary dispute, and thus constituted a violation of Section 8(b)(4) (A) of the Act.

B. The Board’s finding that the purpose of the construction site picketing was to induce secondary activity is amply supported by the evidence

As this Court has observed, the normal implication of a picket line is an appeal to fellow employees to engage in work stoppages in support of the picketing union. *Printing Specialties Union v. LeBaron*, 171 F. 2d 331, 334, certiorari denied, 336 U.S. 949. As explained by the Court (171 F. 2d at 334):

The reluctance of workers to cross a picket line is notorious. To them the presence of the line implies a promise that if they respond by refusing to cross it, the workers making the

appeal will in turn cooperate if the need arises. The converse, likewise, is implicit. "Respect our picket line and we will respect yours."

See also, *N.L.R.B. v. Laundry Drivers Local 928*, 262 F. 2d 617, 620 (C.A. 9).

Rather than making any effort to neutralize the secondary implication of the picket line in the instant case, the actions of the Union, as shown by the combination of circumstances enumerated below, confirm that from its inception the picketing was intended to have its normal meaning and effect.

1. As stated *supra*, p. 5, picketing occurred on three occasions at the California State Polytechnic College campus and once at the State Hospital at times when no employees of Gardner were present. The picketing in these instances was clearly violative of Section 8(b)(4)(A), for the only conceivable justification for construction situs picketing—the presence of primary employees—was lacking. See pp. 10–11, *supra*. See also *N.L.R.B. v. Service Trade Chauffeurs*, 199 F. 2d 709 (C.A. 2). Moreover, the significance of the continued picketing during the absence of Gardner's employees is not limited to a finding of a violation during those periods, but reflects an overall purpose to picket so long as neutral employees could be reached.

Before the Board the Union sought to excuse these instances of secondary picketing on the ground that it was unable to distinguish neutral employees from Gardner's employees from those of neutral contractors. But this explanation reveals only that the Union made no effort to identify Gardner's employees and direct

its picketing at them, a step that most certainly would have been taken had the construction situs picketing been primarily for the purpose, as the Union claimed, of “organiz[ing] Gardner’s employees * * * and trying to have someone there that they could contact if they felt like joining the [Union]” (R. 79). The short of the matter is that the Union had an independent purpose in directing its appeal to the neutral employees, which it furthered without respect to the presence of Gardner’s employees.

2. As shown *supra*, p. 3, Gardner’s employees reported at the company’s warehouse in Ontario at the beginning and end of each workday. The warehouse thus provided an available place for picketing where the Union could publicize its organizational purposes to Gardner’s employees without implicating the neutral contractors and their employees who were located at scattered construction sites as much as 35–40 miles distant from the warehouse (R. 38). This circumstance alone has been regarded in like cases as evincing a purpose to involve neutrals when a union has extended its picketing activities to secondary locations. As stated by the Court of Appeals for the First Circuit (*N.L.R.B. v. United Steelworkers*, 250 F. 2d 184, 187):

Thus by picketing the premises of the primary employer . . . alone, the Union had a fully adequate opportunity to publicize its labor dispute to the members of the bargaining unit. . . . Certainly from these facts it was logical and reasonable for the Board to draw the inference that the Union’s picketing of [the primary employer’s] truck at the premises of sec-

ondary employers must have been designed, in part at least, to encourage those employers to cease doing business with [the primary employer], or to induce their employees not to handle or transport [the primary employer's] freight.

See also, *N.L.R.B. v. General Drivers, Local 984*, 251 F. 2d 494, 495 (C.A. 6); *N.L.R.B. v. Truck Drivers Local 728*, 228 F. 2d 791, 795 (C.A. 5); *N.L.R.B. v. Associated Musicians*, 226 F. 2d 900, 906 (C.A. 2), certiorari denied, 351 U.S. 962.⁵

3. Union business agent Devereaux, who was in charge of the Union's picketing program, made clear in his conversation with McClary, Hydro Company's partner, that a principal purpose of the picket line at California State Polytechnic College was to reach Hydro's employees. When McClary inquired whether Hydro employees could work free from the picketing during weekends and evenings, when Gardner's employees were not on the job, Devereaux replied that it was a 24 hour picket line, and that McClary "knew what would happen" if he were to have "his men sneak in after 4:30 when the picket left" (R. 81, 85). Although Section 8(b)(4)(A) does not reach statements of this character when addressed to neutral employers, they provide cogent evidence to resolve whatever ambiguity may otherwise exist as to the pur-

⁵ Cf. *Sales Drivers v. N.L.R.B.*, 229 F. 2d 514 (C.A.D.C.) certiorari denied, 351 U.S. 972, where the Court, although declining to view the availability of a primary situs for picketing as conclusive in showing an unlawful secondary purpose to the picketing of neutral premises, fully recognized that this factor should "be considered" in the determination of the purpose of such picketing. 229 F. 2d at 514.

pose of common situs picketing. *N.L.R.B. v. General Drivers, Local 984*, 251 F. 2d 494, 495 (C.A. 6); *Truck Drivers v. N.L.R.B.*, 249 F. 2d 512, 514 (C.A.D.C.) certiorari denied, 355 U.S. 958; *N.L.R.B. v. Associated Musicians*, 226 F. 2d 900, 904 (C.A. 2), certiorari denied, 351 U.S. 962.

4. The legend on the picket line which was in use during all but the last few days of the picketing at California State Polytechnic College did not confine the Union's appeal merely to Gardner's employees. On the contrary, it was addressed generally "To Employees" (*supra*, p. 4). Although the legend went on to state that "This is an organizational picket line," and that Gardner was "non-union," the implication of this kind of sign is "Respect our picket line * * *" *Printing Specialties Union v. LeBaron*, 171 F. 2d 331, 334 (C.A. 9); see also, pp. 12-13, *supra*. This is particularly true in the situation where, as here, non-union men are employed on the same job as union men. Compare *N.L.R.B. v. Denver Building & Construction Trades Council*, 341 U.S. 675, 678-679-688. It is true that the picket sign language was made more restrictive on November 18, 1957, three days before picketing was removed altogether, but "This was long after the damage was done." *N.L.R.B. v. Laundry Drivers Local 928*, 262 F. 2d 617, 620 (C.A. 9).

5. Here, as in *Laundry Drivers Local 928, supra*, the Union made no attempt to communicate with neutral employees, apart from the legend on the picket signs, or to inform them that they were not being requested to leave their jobs. On the contrary, Dev-

ereaux instructed the pickets "to say nothing to no one. And if in their considered opinion as an emergency arose * * * that they couldn't handle, by not saying anything, to contact me by telephone" (R. 69). Compare *Laundry Drivers Local 928, supra*, at 620, where the Court concluded, after considering a nearly identical set of instructions given to union pickets, that "the unions did nothing to dispel the natural effect of a picket line." See also, *Truck Drivers v. N.L.R.B.*, 249 F. 2d 512, 514 (C.A.D.C.).

In the instant case, moreover, the situation clearly called for clarification if the Union's purpose was as restricted as it claimed. For the Plumbers Union, which represented Hydro's employees, had refused to cooperate with McClary in any way to put these employees back on the job after they refused to work behind the picket line, and indeed, had even refused, so long as the picket line remained in effect, to permit its members to do work that was essential to avoid serious damage to the entire project (*supra*, p. 5). The only explanation for the Union's silence during this period is that the situation had evolved in accordance with Union purpose.

6. Finally, it is significant that the Union's picketing in fact induced work stoppages (*supra*, pp. 4-6). See *N.L.R.B. v. Business Machine Local 459*, 228 F. 2d 553, 560 (C.A. 2), certiorari denied 351 U.S. 962. From the overall conduct of the Union, such stoppages were plainly foreseeable, and in turn reflect the Union's purpose.

In view of all of the foregoing circumstances, the Board could fairly conclude that the picketing in this

case was carried on with a deliberate purpose of implicating neutrals in the Union's campaign to organize Gardner's employees. As shown, it is that purpose which illegalizes the picketing.

CONCLUSION

For the reasons stated it is respectfully submitted that a decree should issue enforcing the Board's order in full.

STUART ROTHMAN,
General Counsel,
THOMAS J. McDERMOTT,
Associate General Counsel,
MARCEL MALLET-PREVOST,
Assistant General Counsel,
DUANE B. BEESON,
CHRISTOPHER J. HOEY,
Attorneys,
National Labor Relations Board.

SEPTEMBER 1959.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 65 Stat. 601, 29 U.S.C., Secs. 151, *et seq.*), are as follows:

SECTION 7. Employees shall have the right to self organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3).

UNFAIR LABOR PRACTICES

SECTION 8(b). It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4) To engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is:

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; * * *

LIMITATIONS

SECTION 13. Nothing in this Act, except as specifically provided herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

No. 16393 ✓

**United States
Court of Appeals**
for the Ninth Circuit

DAVID NAUMU,

Appellant.

VS.

TERRITORY OF HAWAII,

Appellee.

Transcript of Record

**Appeal from the Supreme Court for the
Territory of Hawaii**

FILED

APR 23 1959

PAUL P. O'BRIEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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ATTORNEYS OF RECORD

HYMAN M. GREENSTEIN, ESQ.,

400 S. Beretania St.,

Honolulu, Hawaii,

For the Appellant.

JOHN H. PETERS, ESQ.,

Public Prosecutor;

FREDERICK T. J. TITCOMB,

Asst. Public Prosecutor,

City Hall,

Honolulu, Hawaii,

For the Appellee.

In the District Court of Honolulu, City and
County of, Territory of Hawaii

TERRITORY OF HAWAII,

vs.

DAVID NAUMU,

Defendant.

January 9, 1958

Hon. E. Ing: Presiding.

L. Ishida: Prosecuting.

D. Look: Clerk-Reporter.

Violation of Section 11343 Revised Laws
of Hawaii, 1945. (Gambling)

CHARGE

(Defendant charged with one other)

Walter Y. Miyashiro and David Naumu you and each of you are hereby charged in Honolulu, City & County of Honolulu, Territory of Hawaii, in that on or about the 5th day of February, 1957, you did conduct a gambling game in which machines were used or in which something of value was won or lost to wit: free games on the pinball machines, contrary to Section 11343/45.

In the District Court of Honolulu, City and
County of Honolulu, Territory of Hawaii

TERRITORY OF HAWAII,

vs.

DAVID NAUMU,

Defendant.

TERRITORY OF HAWAII,

vs.

HOWARD WONG,

Defendant.

TERRITORY OF HAWAII,

vs.

KENICHI KANESHIRO,

Defendant.

TERRITORY OF HAWAII,

vs.

WALTER Y. MIYASHIRO,

Defendant.

DEMURRER
(Gambling)

Come now defendants above named, by Hyman M. Greenstein and Robert A. Franklin, their attorneys, and hereby demur to the charge or complaint filed against them, and move to quash the same upon the following grounds:

I.

That said complaint or charge fails to state facts sufficient to constitute a violation of Section 11343, Revised Laws of Hawaii, 1945, in that defendants are charged with having carried on and conducted a gambling game known as "pin ball" wherein things of value, to wit, free games, were either won or lost; and that the giving of a free game or games does not constitute the giving of anything of value within the meaning and prohibition of said gambling statute.

II.

That Section 11343, Revised Laws of Hawaii, 1945, upon which said complaint or charge is based, is invalid, defective, null and void in violation of defendants' rights under the Fifth and Fourteenth Amendments to the Constitution of the United States in that said statute is vague, indefinite and uncertain.

III.

That said Section 11343, Revised Laws of Hawaii, 1945, a statute prohibiting gambling, is invalid, defective, null and void, in violation of defendants' property rights under the Fifth and Fourteenth Amendments to the Constitution of the United States, as applied herein, to the operation by defendants of a pin ball machine game wherein free games or free re-plays may be awarded to a successful player.

Dated: Honolulu, Hawaii, this 10th day of January, 1958.

DAVID NAUMU, KENICHI KANESHIRO,
HOWARD WONG, and WALTER Y. MIYA-
SHIRO,

Defendants;

By HYMAN M. GREENSTEIN and
ROBERT A. FRANKLIN,
Their Attorneys;

By /s/ HYMAN M. GREENSTEIN.

[Endorsed]: Filed January 13, 1958.

In the District Court of Honolulu, City and County
of Honolulu, Territory of Hawaii

TERRITORY OF HAWAII,

vs.

DAVID NAUMU,

Defendant.

(Gambling)

MAGISTRATE'S CERTIFICATE OF APPEAL

I hereby certify that on the 24th day of January, 1958, defendant was found guilty of a violation of Section 11343, Revised Laws of Hawaii, 1945, and sentenced to pay a fine of \$25.00, suspended.

He was charged orally that on February 5, 1957, in Honolulu, he carried on and conducted a gambling game known as "pin ball" wherein things of value, to wit, free games were won or lost, in violation of Section 11343, R.L.H. 1945.

A demurrer was filed on behalf of said defendant challenging the applicability of the facts alleged to the offense charged, and challenging the constitutionality of the statute as enacted and applied.

This demurrer was overruled.

The case was then submitted on an agreed statement of facts which consisted of the following:

1. Defendant admitted that at the time and place alleged in the charge, he did operate and maintain a pin ball machine game wherein free games were won or lost.

2. That at the time of the arrest of the defendant the machine in question was seized and confiscated by the police.

The case being submitted on said agreed statement of facts, a finding of guilty was entered against the defendant as aforesaid.

I further certify that the points of law involved herein are as set forth in said demurrer.

Defendant contends in said demurrer.

“

I.

That said complaint or charge fails to state facts sufficient to constitute a violation of Section 11343,

Revised Laws of Hawaii, 1945, in that defendant is charged with having carried on and conducted a gambling game known as "pin ball" wherein things of value, to wit, free games, were either won or lost; and that the giving of a free game or games does not constitute the giving of anything of value within the meaning and prohibition of said gambling statute.

II.

That Section 11343, Revised Laws of Hawaii, 1945, upon which said complaint or charge is based, is invalid, defective, null and void in violation of defendant's rights under the Fifth and Fourteenth Amendments to the Constitution of the United States in that said statute is vague, indefinite and uncertain.

III.

That said Section 11343, Revised Laws of Hawaii, 1945, a statute prohibiting gambling, is invalid, defective, null and void, in violation of defendant's property rights under the Fifth and Fourteenth Amendments to the Constitution of the United States, as applied herein, to the operation by defendant of a pin ball machine game wherein free games or free re-plays may be awarded to a successful player."

That I ruled against the defendant on all said points of law, in overruling said demurrer.

An appeal from said judgment has been duly noted by the defendant to the Supreme Court of the

Territory of Hawaii on points of law, and said appeal has been duly perfected.

A full and correct copy of my record in this case is hereto attached.

Given under my hand this 21st day of February, 1958.

/s/ HARRY STEINER,
District Magistrate, District Court of Honolulu, City
and County of Honolulu, Territory of Hawaii.

Approved as to form:

/s/ FREDERICK J. TITCOMB,
Assistant Public Prosecutor.

[Endorsed]: Filed February 18, 1958. .

[Title of District Court and Cause.]

NOTICE AND CERTIFICATE OF APPEAL TO
THE SUPREME COURT OF THE TERRI-
TORY OF HAWAII ON POINTS OF LAW

I Hereby Certify that on the 24th day of January, 1958, in the above-entitled cause, I found the above-named defendant guilty of the violation, to wit:

Walter Y. Miyashiro and David Naumu you and each of you are hereby charged in Honolulu, City and County of Honolulu, Territory of Hawaii, in

that on or about the 5th day of February, 1957, you did conduct a gambling game in which machines were used or in which something of value was won or lost to wit: free games on the pinball machines, contrary to Section 11343, Revised Laws of Hawaii, 1495;

and sentenced him to pay a fine of \$25.00; however, execution of the fine suspended for 13 months.

That an appeal from said judgment was duly noted by the defendant above named to the Supreme Court of the Territory of Hawaii, on Points of Law and that said appeal has since been duly perfected.

A full and correct copy of my record in said case is hereto attached.

Given Under My Hand this 18th day of February, A.D. 1958.

/s/ HARRY STEINER,

1st District Magistrate of Honolulu, City and County of Honolulu, Territory of Hawaii.

D.C. Complaint No. 1957-484

Note—Magistrates will do well, at the time of rendering judgment, cause the annexed notice to be signed by the losing party, whether the appeal will be perfected or not. If the appeal is not perfected the certificate will not be signed or used. See Chapter 96, Revised Laws of Hawaii 1935.

District Court of Honolulu, City and
County of Honolulu, Territory of Hawaii

TERRITORY OF HAWAII,

vs.

DAVID NAUMU,

Defendant.

The defendant in this case appeals from the judgment herein to the Supreme Court of the Territory of Hawaii, on Points of Law.

Dated, Honolulu, T. H., January 31, 1958.

/s/ DAVID NAUMU,

By /s/ H. M. GREENSTEIN,
His Atty.

Appeal filed Jan. 31, 1958, at 1:25 P.M.

Appeal bond filed No.\$.19.., at..P.M.

/s/ M. E. THEVENIN,
Clerk, District Court of
Honolulu.

Appeal perfected Feb. 18, 1958, at 3:00 P.M.

Appeal costs paid \$50.00, Feb. ..., 1958, 3:00 P.M.

Appeal bond filed No.\$.19.., at..P.M.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

I, Pearl E. Souza, Clerk of the District Court of Honolulu, do hereby certify that the foregoing papers are the originals in the above-entitled cause.

The documents are specifically designated and enumerated as follows:

1. Charge (defendant charged with one other).
2. Demurrer.
3. Magistrate's certificate of appeal.
4. Notice and certificate of appeal.
5. This praecipe.
6. Clerk's certificate.
7. Itemized statement of costs.

Dated at Honolulu, City and County of Honolulu, Territory of Hawaii, this 21st day of March, 1958.

/s/ PEARL E. SOUZA,
Clerk, District Court of
Honolulu.

In the Supreme Court of the
Territory of Hawaii

October Term, 1958

No. 4067

TERRITORY OF HAWAII,

vs.

DAVID NAUMU.

Points of Law to District Court of Honolulu,
Hon. Harry Steiner, Magistrate.

OPINION

Submitted November 3, 1958

Decided December 15, 1958.

Rice, C. J., Stainback and Marumoto, J.

Constitutional Law—statute—vagueness.

Vagueness in a statute may violate the due process clause of the Fifth and Fourteenth Amendments to the Constitution of the United States.

Same—same—same.

A statute which gives adequate warning of what falls under its ban and provides a sufficient standard for its objective and impartial application meets the requirements of due process.

Same—same—same.

A statute which prohibits any game in which money or “anything of value” is lost or won is not so vague as to violate the due process clause.

Same—same—discriminatory application.

Denial of equal justice by the application of a statute fair on its face in a discriminatory manner is within the prohibition of the Constitution.

Same—same—same.

Application of R. L. H. 1955, § 288-4, to pinball machine games in which free plays are awarded does not constitute discriminatory application of the statute.

Opinion of the Court by Marumoto, J.

Appellant, David Naumu, was charged in the district court of Honolulu with conducting “a gambling game in which machines were used or in which something of value was won or lost, to wit: free games on the pinball machines contrary to Section 11343 RLH/45.” He interposed a demurrer challenging the applicability of the facts alleged to the offense charged and the constitutionality of the statute as enacted and applied. The district magistrate overruled the demurrer. Thereupon, the parties submitted the case on an agreed statement of facts in which appellant admitted that at the time and place alleged in the charge he operated a pinball machine game in which free games were won or lost. The

magistrate found appellant guilty and sentenced him to pay a fine of \$25, suspended.

The case is before us on appeal from such judgment on points of law.

Appellant alleges that the magistrate erred in ruling:

(1) that the charge stated facts sufficient to constitute a violation of R.L.H. 1945, § 11343, now R.L.H. 1955, § 288-4;

(2) that R.L.H. 1955, § 288-4, is not invalid, defective, null and void, in violation of appellant's rights under the Fifth and Fourteenth Amendments to the Constitution of the United States in that the statute is vague, indefinite and uncertain; and

(3) that R.L.H. 1955, § 288-4, is not invalid, defective, null and void, in violation of appellant's property rights under the Fifth and Fourteenth Amendments to the Constitution of the United States, as applied in the case, to the operation of a pinball machine game wherein free plays or free re-plays may be awarded to a successful player.

The statute in question provides for the punishment of every person found guilty of conducting any game in which money or "anything of value" is lost or won. In *Territory vs. Uyehara*, 42 Haw. 184, we held that free games won on a pinball machine came within the meaning of "anything of value" as used in the statute.

We see no merit in the first error alleged by appellant. The question raised therein is identical with

the question considered and decided in the Uyehara case.

With reference to the second alleged error, appellant's contention is that the phrase "anything of value" in R.L.H. 1955, § 288-4, is too vague, indefinite and uncertain to withstand the strict construction due a penal statute.

A statute may be so vague as to violate the due process clause of the Fifth and Fourteenth Amendments. In *Connally vs. General Construction Co.*, 269 U. S. 385, the Supreme Court of the United States affirmed an interlocutory decree of the district court enjoining the enforcement of a statute containing the phrase "current rate of per diem wages in the locality where the work is performed." In doing so, the court made the oft-quoted statement that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

However, actually the court has required less definiteness than is indicated in the foregoing statement in the *Connally* case. This fact is recognized in the following further statement in that very case:

"The question whether given legislative enactments have been thus wanting in certainty has frequently been before this court. In some of the cases the statutes involved were upheld; in others, declared invalid. The precise point of differentiation in some instances is not easy of statement. But it

will be enough for present purposes to say generally that the decisions of the court upholding statutes as sufficiently certain, rested upon the conclusion that they employed words or phrases having a technical or other special meaning, well enough known to enable those within their reach to correctly apply them, *Hygrade Provision Co. vs. Sherman*, 266 U. S. 497, 502; *Omaechevarria vs. Idaho*, 246 U. S. 343, 348, or a well-settled common law meaning, notwithstanding an element of degree in the definition as to which estimates might differ, *Nash vs. United States*, 229 U. S. 373, 376; *International Harvester Co. vs. Kentucky*, [234 U. S. 216, 223], or, as broadly stated by Mr. Chief Justice White in *United States vs. Cohen Grocery Co.*, 255 U.S. 81, 92, 'that, for reasons found to result either from the text of the statutes involved or the subject with which they dealt, a standard of some sort was afforded.' "

In *United States vs. Petrillo*, 332 U. S. 1, the court upheld the validity of a section of the Communications Act of 1934, 48 Stat. 1064, 1102, as amended, which provided for the punishment of any person attempting to coerce a licensee to employ "any person or persons in excess of the number of employees needed by such licensee to perform actual services." The court stated:

"* * * We think that the language Congress used provides an adequate warning as to what conduct falls under its ban, and marks boundaries sufficiently distinct for judges and juries fairly to administer the law in accordance with the will of Congress. That there may be marginal cases in which it is

difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense. *Robinson vs. United States*, 324 U. S. 282, 285-286. It would strain the requirement for certainty in criminal law standards too near the breaking point to say that it was impossible judicially to determine whether a person knew when he was wilfully attempting to compel another to hire unneeded employees. See *Screws vs. United States*, 325 U. S. 91; *United States vs. Ragen*, 314 U. S. 513, 522, 524, 525. The Constitution has erected procedural safeguards to protect against conviction for crime except for violation of laws which have clearly defined conduct thereafter to be punished; but the Constitution does not require impossible standards. The language here challenged conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. The Constitution requires no more."

The language that was attacked in the *Connally* case presented, in the opinion of the court, a double uncertainty fatal in a criminal statute. The words "current rate of per diem wages" did not denote a specific sum, but minimum, maximum and intermediate amounts, indeterminately, varying from time to time and dependent upon such considerations as kinds of work done and efficiency of workmen; and the word "locality" was an elastic term which might be equally satisfied by areas measured by rods or by miles, depending upon circumstances. The vice in the language was that it made the application of

the law depend "not upon a word of fixed meaning in itself, or one made definite by statutory or judicial definition, or by the context or other legitimate aid to its construction," but upon the personal equation of those who applied the law. In other words, the language did not provide a rule of sufficient objectivity to guard against an arbitrary result.

In our opinion, the phrase "anything of value," as used in R.L.H. 1955, § 288-4, is not subject to such vice and does not render the statute constitutionally vulnerable for uncertainty. It can hardly be said that the phrase does not give adequate warning as to what falls under its ban or that it does not provide a sufficient standard for the objective and impartial application of the law.

Such phrase is commonly found in state statutes designed to curb the evils of gambling. In a gambling statute, the use of such all-embracing and catchall phrase is necessary to meet the ingenuity of those who are intent upon circumventing the law. A new method of circumvention necessarily raises a question as to the applicability of the law to the invention. The fact that such question is raised does not make the law uncertain in a constitutional sense. Those who devise means of circumvention take the risk of treading on the brink of the law. As stated by Mr. Justice Holmes in *United States vs. Wurzbach*, 280 U. S. 396, 399: "The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to make him take the risk."

The third error alleged by appellant hardly requires our consideration, for the appellant himself has not given any serious consideration to it. His brief on this point covers less than one page. He has not cited any authority, although apparently he relies on the principle first set forth in *Yick Wo vs. Hopkins*, 118 U. S. 356, 373, as follows: "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." We do not see any such discriminatory application of the law in this case.

Affirmed.

/s/ PHILIP L. RICE,

HYMAN M. GREENSTEIN,

For Defendant-Appellant.

/s/ INGRAM M. STAINBACH;

FREDERICK J. TITCOMB,

Assistant Public Prosecutor,

City and County of Honolulu,

For Plaintiff-Appellee.

/s/ MASAJI MARUMOTO.

[Endorsed]: Filed December 15, 1958.

United States Court of Appeals
for the Ninth Circuit

No. 16393

DAVID NAUMU,

Appellant,

vs.

TERRITORY OF HAWAII,

Appellee.

COST BOND

Know All Men by These Presents:

That David Naumu, as Principal, and Continental Casualty Company, as surety, are held and firmly bound unto the Territory of Hawaii in the full sum of Two Hundred Fifty Dollars (\$250.00) for the payment of which well and truly to be made we do bind ourselves, our heirs, executors, administrators and successors, jointly and severally by these presents.

Whereas, lately, on to wit, the 15th day of December, 1958, the Supreme Court of the Territory of Hawaii, affirmed a judgment of conviction against the Principal above named; and

Whereas, notice of appeal has been given of appeal to the United States Court of Appeals for the Ninth Circuit, to secure a reversal of said judgment;

Now, Therefore, the condition of the above obligation is such that if the said David Naumu shall

prosecute his appeal with effect, and shall answer all costs if he fails to make good his appeal, then this obligation shall be void; otherwise to remain in full force, effect and virtue.

In Witness Whereof, the above-bounden Principal and surety have affixed their signatures this 15th day of January, 1959.

DAVID NAUMU,

By /s/ HYMAN M. GREENSTEIN,
Principal.

CONTINENTAL CASUALTY
COMPANY,

By /s/ MORITO TSUGAWA,
Its Attorney-in-Fact.

[Seal] By /s/ KENNETH I. SETO,
Its Attorney-in-Fact.

Surety.

City and County of Honolulu,
Territory of Hawaii—ss.

On this 15th day of January, 1959, before me appeared Morito Tsugawa and Kenneth I. Seto, to me personally known, who, being by me duly sworn, did say that they are the Attorneys-in-Fact of the Continental Casualty Company, a corporation of the State of Illinois, duly appointed under Power of

Attorney dated the September 26, 1956, which Power of Attorney is now in full force and effect; that the said Continental Casualty Company is and was on April 15, 1958, duly authorized by the Insurance Commissioner of the Territory of Hawaii to guarantee the fidelity of persons holding offices of public or private trust and the performance of contracts other than of insurance and to execute and guarantee bonds and undertakings required or permitted in actions or proceedings or by law allowed; and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed on behalf of said corporation, under the authority of its Board of Directors, and said Morito Tsugawa and Kenneth I. Seto acknowledged said instrument to be the free act and deed of said corporation.

[Seal] /s/ JAMES SLEIPA CHINA,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

My commission expires: October 10, 1959.

[Endorsed]: Filed January 15, 1959.

In the Supreme Court of the Territory of
Hawaii, October Term 1958

No. 4067

TERRITORY OF HAWAII,

Plaintiff-Appellee,

vs.

DAVID NAUMU,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF
HONOLULU ON POINTS OF LAW

JUDGMENT ON WRIT OF ERROR

Pursuant to the opinion of the supreme court of
the Territory of Hawaii, rendered and filed on
December 15, 1958, the judgment of the lower court
is affirmed.

Dated: Honolulu, Hawaii, February 2, 1959.

By the Court:

[Seal] /s/ LEOTI V. KRONE,
Clerk.

Approved:

/s/ MASAJI MARUMOTO,
Associate Justice.

[Endorsed]: Filed February 2, 1959.

[Title of Supreme Court and Cause.]

AMENDED NOTICE OF APPEAL

Name and Address of Appellant—David Naumu,
558 K Road, Honolulu, Hawaii.

Name and Address of Appellant's Attorney: Hy-
man M. Greenstein, 400 South Beretania Street,
P. O. Box 661, Honolulu, Hawaii.

Offense: Operating a game known as "pin ball"
wherein things of value, to wit, free games were
won or lost, in violation of Section 11343, Revised
Laws of Hawaii, 1945 (gambling statute).

Judgment: Appellant was found guilty in the Dis-
trict Court of Honolulu on January 24, 1958, and
sentenced to pay a fine of \$25.00, suspended.

Judgment Affirmed: By the Supreme Court of the
Territory of Hawaii, February 2, 1959.

Appellant above named hereby appeals to the
United States Court of Appeals for the Ninth Cir-
cuit from the above-stated judgment.

Dated at Honolulu, Hawaii, this 7th day of Feb-
ruary, 1959.

/s/ HYMAN M. GREENSTEIN,
Attorney for Appellant.

[Endorsed]: Filed February 9, 1959.

In the United States Court of Appeals
for the Ninth Circuit

No. 16393

(Supreme Court No. 4067)

DAVID NAUMU,

Appellant,

vs.

TERRITORY OF HAWAII,

Appellee.

Appeal from Supreme Court of Hawaii to 9 CCA

Hon. Philip L. Rice, C. J.

Hon. Ingram M. Stainback, J.

Hon. Masaji Marumoto, J.

SUPREME COURT CLERK'S CERTIFICATE

I, Leoti V. Krone, clerk of the Supreme Court, Territory of Hawaii, do certify that the documents listed in the index to the certified record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled court and cause, and in accordance with the amended designation of contents of record on appeal filed February 9, 1959, are full, true and correct copies and certified copies of the originals filed in said court and cause, except such documents listed in said index as originals, and that such documents so listed are the originals filed in said court and cause.

I further certify that all of the above listed items are attached hereto.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the above court this 23rd day of February, 1959.

[Seal] /s/ LEOTI V. KRONE,
Clerk.

[Endorsed]: No. 16393. United States Court of Appeals for the Ninth Circuit. David Naumu, Appellant, vs. Territory of Hawaii, Appellee. Transcript of Record. Appeal from the Supreme Court for the Territory of Hawaii.

Filed February 28, 1959.

Docketed: March 7, 1959.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH AP-
PELLANT INTENDS TO RELY ON AP-
PEAL

Appellant intends to rely upon the following points on appeal:

1. The Court below erred in ruling that the charge stated facts sufficient to constitute a violation of Section 11343, Revised Laws of Hawaii, 1945, now Section 288-4, Revised Laws of Hawaii, 1955.

2. The Court below erred in ruling that said statute is not violative of appellant's constitutional rights in that said statute is vague, indefinite and uncertain.

3. The Court below erred in ruling that said statute as applied to the operation of a pinball machine game wherein free games or free re-plays may be awarded to a successful player is not violative of appellant's constitutional rights.

Dated at Honolulu, Hawaii, this 15th day of January, 1959.

/s/ HYMAN M. GREENSTEIN,
Attorney for Appellant.

HYMAN M. GREENSTEIN and
ROBERT A. FRANKLIN,
Of Counsel.

Receipt of copy acknowledged.

[Endorsed]: Filed March 9, 1959.

No. 16,393

IN THE

United States Court of Appeals
For the Ninth Circuit

DAVID NAUMU,

Appellant,

VS.

TERRITORY OF HAWAII,

Appellee.

Upon Appeal from the Supreme Court
for the Territory of Hawaii.

APPELLANT'S BRIEF.

HYMAN M. GREENSTEIN,
400 South Beretania Street,
P. O. Box 661,
Honolulu, Hawaii,
Attorney for Appellant.

FILED

JUN 25 1959

PAUL P. O'BRIEN, CLERK



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No. 16,393

IN THE

**United States Court of Appeals
For the Ninth Circuit**

DAVID NAUMU,

Appellant,

VS.

TERRITORY OF HAWAII,

Appellee.

Upon Appeal from the Supreme Court
for the Territory of Hawaii.

APPELLANT'S BRIEF.

Appellant, a defendant in a criminal action, has appealed from a judgment of the Supreme Court of the Territory of Hawaii, affirming the judgment of the District Court of Honolulu, County of Honolulu, Territory of Hawaii.

STATEMENT OF JURISDICTION.

Appellant was orally charged in the District Court of Honolulu, County of Honolulu, Territory of Hawaii, that he "did conduct a gambling game in which machines were used or in which something of

value was won or lost, to-wit: free games on the pinball machines, contrary to Section 11343 of the Revised Laws of Hawaii, 1945." (Now, Sec. 288-4, R.L.H. 1955.)

Following the over-ruling of a demurrer interposed by appellant to the charge, the District Court entered judgment from which an appeal was taken to the Supreme Court of the Territory of Hawaii, where said judgment was affirmed.

The jurisdiction of this Court to review said judgment of the Supreme Court of the Territory of Hawaii is sustained by Section 1293, 28 USCA, this case being one in which "the Constitution, laws or treaties of the United States or any authority exercised thereunder" is involved.

STATEMENT OF THE CASE.

Appellant was orally charged in the District Court of Honolulu, County of Honolulu, Territory of Hawaii, on January 9, 1958, with conducting a gambling game in which machines were used or in which something of value was won or lost, to-wit: free games on the pinball machines. On January 13, 1958, a demurrer to the charge was filed by appellant, alleging that:

1. The charge failed to state facts sufficient to constitute a violation of Section 11343, Revised Laws of Hawaii, 1945, in that the giving of "free games" did not constitute the giving of "anything of value" within the meaning and prohibition of said gambling statute;

2. That said Section 11343 is invalid, defective, null and void, in violation of appellant's right under the Fifth and Fourteenth Amendments to the Constitution of the United States in that said statute is vague, indefinite and uncertain;

3. That said Section 11343 is invalid, defective, null and void, in violation of appellant's property rights under the Fifth and Fourteenth Amendments to the Constitution of the United States, as applied herein, to the operation of a pinball machine game wherein free games may be awarded to a successful player.

On January 24, 1948, the demurrer was over-ruled, following which the case was submitted on an agreed statement of facts, that appellant did operate and maintain a pinball machine game wherein free games were won or lost. (T. 7.) Appeal from the judgment of the said District Court was taken on points of law as stated in the demurrer and the agreed statement of facts. (T. 7, 8, 9, 10, 15.) Appellant gave notice of appeal from said judgment on January 31, 1958, which appeal was perfected on February 18, 1958. Pursuant to such appeal, the Supreme Court of the Territory of Hawaii affirmed the judgment of the District Court of Honolulu by its judgment filed on February 2, 1959.

On February 9, 1959, appellant filed his amended notice of appeal in the United States Court of Appeals for the Ninth Circuit. The appeal was docketed in said Court on March 7, 1959.

SPECIFICATION OF ERRORS RELIED UPON.

1. The Supreme Court of the Territory of Hawaii erred in affirming the judgment of the District Court of Honolulu, County of Honolulu, Territory of Hawaii, in ruling that the charge as stated constituted a violation of Section 11343, Revised Laws of Hawaii, 1945. (T. 28.)

2. The Supreme Court erred in ruling that said Section 11343 did not violate appellant's constitutional rights in that said statute is not vague, indefinite and uncertain. (T. 28.)

ARGUMENT OF THE CASE.

ISSUE INVOLVED.

Reduced to its simplest terms, this appeal poses the question as to whether the awarding of free games upon the attainment of a certain score, in a pinball machine game, constitutes a violation of the gambling statute of the Territory of Hawaii.

SUMMARY OF ARGUMENT.

In determining whether a criminal charge states facts sufficient to constitute violation of a criminal statute, the Court must attempt interpretation of the statute whenever there is an ambiguity. An ambiguity may be found to exist even in language unambiguous on its face. And in construing a particular statutory phrase, the Court must look to not only other provisions of the same statutes using the same language

whether they are strictly *in pari materia* or not. The Court must also follow statutory guides for construction. In addition, the Court must construe the criminal statute strictly in favor of the accused, whenever that is possible.

The Constitution of the United States requires that statutes defining criminal offenses must not be vague, indefinite, or uncertain. The abstract tests suggested by the many cases are not very helpful in determining whether a particular criminal statute is fatally vague, indefinite, or uncertain. The language of the statute questioned must be carefully examined with the question of whether fair notice has or has not been given to those who may be affected thereby.

SPECIFICATION OF ERROR NO. 1.

THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN RULING THAT THE CHARGE STATED FACTS SUFFICIENT TO CONSTITUTE A VIOLATION OF SECTION 11343 OF THE REVISED LAWS OF HAWAII, 1945.

The first specification of error raises the question of the interpretation of Section 11343, Revised Laws of Hawaii, 1945, under which appellant was charged. The Supreme Court of the Territory of Hawaii apparently treated this specification as only involving the meaning to be given one phrase of the said statute. (T. 15, 16.) No discussion was made and the specification dismissed by a reference to *Territory v. Uyehara, infra*.

It is submitted that the said specification involves issues broader than that considered by the Hawaii

Supreme Court as will appear, *infra*. However, the appellant does not concede that the Hawaii Supreme Court was right in its ruling that “anything of value” included free games won on pinball machines. In the *Uyehara* case, the Hawaii Supreme Court first stated that it was not necessary for a pinball machine game to be *ejusdem generis* with the games enumerated in the said Section 11343, but that if it had to be, such a game was a “banking” game and hence a game that was specifically enumerated. It then proceeded to hold that a “free game” won on a pinball machine was “anything of value”. As will be considered later, the said statute has two phrases describing the stakes, one applicable to the enumerated games and one applicable to “any other game”. It will be noticed that the charge that was actually given in this case refers to “something of value” and not “anything representative of value”. (T. 3.) Appellant’s discussion will cover not only the disputed phrase “anything of value” but also the phrase “anything representative of value” in attempting to show that the Hawaii Supreme Court erred in its ruling on the first specification of error.

The Courts of the several states are not in unanimity as to whether free games can properly be considered as “anything of value”, or encompassed within the meaning of words having a substantially equivalent meaning. Perhaps the latest case in point is that of *McNeice v. City of Minneapolis*, 250 Minn. 142, 84 N.W. 2d 232 (1957). In that case, the Court stated on page 144:

“There is a sharp division of authority on the question of whether a pinball machine awarding only free replays constitutes a gambling device. It appears that in those jurisdictions where the statutes do not expressly mention whether such machines are illegal, the determination is left to the courts. In those jurisdictions where the statutes do not expressly mention free-play machines, the majority holding is that free plays as an award for successful operation of pinball machines do not constitute property or a thing of value.” (Citations omitted.)

In accord are numerous cases from many jurisdictions including the following:

- Washington Coin Machine Assn. v. Callahan*,
79 App. D.C. 41, 142 F. 2d 97 (1944);
- Chicago Patent Corp. v. Genco, Inc.*, 124 F. 2d
725 (1941);
- Davies v. Mills Novelty Corp.*, 70 F. 2d 424
(1934);
- Mills Novelty Co. v. Farrell*, 64 F. 2d 476
(1933);
- State v. Waite*, 156 Kan. 143, 131 P. 2d 708,
148 ALR 874 (1942);
- State v. One Bally Coney Island No. 21011
Gaming Table*, 174 Kan. 757, 258 P. 2d 225
(1953);
- State v. Betti*, 23 N.J. Misc. 169, 42 A. 2d 640
(1945);
- Overby v. Oklahoma City*, 46 Okla. Cr. 42, 287
P. 796 (1930);
- Wigton's Return*, 151 Pa. Super. 337, 30 A. 2d
352 (1943);

Commonwealth v. Kling, 140 Pa. Super. 68, 13 A. 2d 104 (1940) ;

State v. One "Jack and Jill" Pinball Machine (Mo. App.), 224 S.W. 2d 854 (1949) ;

Crystal Amusement Corp. v. Northrop, 19 Conn. Supp. 498, 118 A. 2d 467 (1955) ;

Gayer v. Whelan, 59 Cal. App. 2d 255, 138 P. 2d 763 (1943) ;

People v. Jennings, 257 N. Y. 196, 177 N.E. 419 (1931).

In *Washington Coin Machine Ass'n v. Callahan*, supra, the Court said:

"Enough has been said to indicate that the issue below and here is limited to the question whether the award of a free play or a second try, in the circumstances we have described, makes such a device a gaming table and its use a game of chance 'for money or property' . . . Whatever inducing motives may actuate the restless, the idle, or the curious to spend their time in this silly form of amusement, it certainly is not the gambling instinct, nor is it the incitement to gain by chance, any more than is the game of solitaire. In the one case no more than in the other is there the hope or chance of a reward which is either money or property."

In *Chicago Patent Corp. v. Genco, Inc.*, supra, the Court said:

"Nothing of monetary value, nothing susceptible of purchase and sale passes to the successful player. At the most, he receives merely an opportunity to continue freely his use of the device

for the enjoyment of which he has originally invested a coin. . . .”

In *People v. One Mechanical Device*, 11 Ill. 2d 151, the Illinois Supreme Court said that:

“We are of the opinion that a free play is neither money, the equivalent of money, nor a valuable thing. It is unrealistic to hold that the possibility of winning a greater or lesser amount of amusement is gambling because if it were, most amusement games would be barred by the statute. . . .”

In so doing, that Court reversed its intermediate Appellate Court which had held contra. *People v. One Mechanical Device*, 9 Ill. App. 2d 338. It also overruled *People v. One Pinball Machine*, 316 Ill. App. 161, 44 N.E. 2d 950.

From the above quotations it is clear that a substantial number of Courts are of the opinion that the phrase “anything of value” or a substantially equivalent phrase does not include free games awarded during the play of pinball machines. In the *McNeice* case, supra, it is stated that the majority holding is to that effect. However, as indicated in that case, there is a contrary line of cases. Probably the latest is that of *Territory of Hawaii v. Uyehara*, 42 Haw. 184 (1958).

In that case, the Supreme Court of the Territory of Hawaii was faced with the identical question here presented. The Court decided that “anything of value” included within its phraseology free games awarded for playing pinball machines. However, that case was not appealed to the Ninth Circuit Court of Appeals because the appeal to the Supreme Court had

been from an interlocutory ruling. Hence, this point has never been presented for a ruling by this Honorable Court.

In the *Uyehara* case, *supra*, the Hawaii Supreme Court held that since a pinball machine game was played for amusement, and since "a right to obtain amusement" has value, that, therefore, a free game on a pinball machine was "anything of value". To buttress its conclusion, the Hawaii Court relied on only one case, that of *Giomi v. Chase*, 47 N.M. 22, 132 P. 2d 715, wherein a similar phrase was stated to be unambiguous and all encompassing and that there was no necessity for interpretation. Admittedly, if statutory language is free from ambiguity, there would be no necessity for judicial interpretation. But the lawbooks are replete with instances where literal statutory language has been torn apart by the Courts, some of them being justified by a desire to ascertain "the true intent" of the legislatures. At the risk of being irreverent, it is here urged that, at the least, there is ambiguity in the phrase "anything of value". It is further urged that if such phrase were unambiguous, what could have prompted the majority of the Courts of last resort to not only attempt a construction of the same or similar phraseology but to construe it as excluding free games from its meaning? It is submitted that the failure of the Hawaii Supreme Court to go beyond the holding of *Giomi v. Chase*, *supra*, was error.

Assuming that the Hawaii Supreme Court erred in not attempting a construction of the disputed

phrase, "anything of value", it should have referred to the statute laws of the Territory of Hawaii dealing with the subject of statutory construction, specifically Sections 1-17, 1-18, and 1-21 of the Revised Laws of Hawaii, 1955.

Section 1-17, *supra*, states that:

"The words of a law are generally to be understood in their most known and usual signification, without attending so much to the literal and strictly grammatical construction of the words as to their general or popular meaning."

Here we have a legislative admission that words may have more than one meaning and that "the general or more popular use or meaning" shall be preferred. As applied to the instant case, can there be any doubt as to the popular or general understanding of the composite elements of gambling? Can there be any doubt as to what the man in the street will say if approached on the question of whether free games awarded during the play of pinball machines, bearing in mind that the disputed phrase has been a part of the gambling statute since at least 1893? Section 11343, Revised Laws of Hawaii, 1945. Admittedly the instant case was before the Supreme Court on points of law and on an agreed statement of facts, but it is submitted that the Honorable Court could properly have taken judicial notice of the general or popular conception on the disputed point. It is submitted that disregard of a statutory mandate on the very thing the Hawaii Supreme Court was called upon to do was error.

Section 1-21, *supra*, states that:

“Laws *in pari materia*, or upon the same subject matter, shall be construed with reference to each other. *What is clear in one statute may be called in aid to explain what is doubtful in another.*”
(Emphasis added.)

On this same subject American Jurisprudence states:

“Ordinarily, the same words used in different statutes on the same subject are interpreted to have the same meaning.” 50 Am. Jur. 260, Sec. 272.

“It has been stated generally that no single statute should be interpreted wholly by its own terms. Thus, in the interpretation of a statute, it is sometimes regarded as proper to consider statutes upon cognate subjects, although not strictly *in pari materia*. . . .” 50 Am. Jur. 343, Sec. 347.

“Under the rule of statutory construction of statutes *in pari materia*, statutes are not to be considered as isolated fragments of law, but as a whole, or as parts of a great, connected, homogeneous system, or a single and complete statutory arrangement. Such statutes are considered as if they constituted but one act, so that sections of one act may be considered as though they were parts of the other act, as far as this can reasonably be done. Indeed, as a general rule, where legislation dealing with a particular subject consists of a system of related general provisions indicative of a settled policy, new enactments of a fragmentary nature on that subject are to be taken as intended to fit into the existing system and to be carried into effect conformably to it, and they should be so construed as to harmonize the

general tenor or purport of the system and make the scheme consistent in all its parts and uniform in its operation, unless a different purpose is shown plainly or with irresistible clearness. . . .” 50 Am. Jur. 346, Sec. 349.

“Although there may be statutory provisions which, in a sense, relate to the same matter and yet are not *in pari materia*, the general rule is that statutes or statutory provisions which relate to the same person or thing, or to the same class of persons or things, or to the same or a closely allied subject or object, may be regarded as *in pari materia*. . . .” 50 Am. Jur. 347, Sec. 350.

From the foregoing, it is clear that resort may be had to other statutory language in determining the meaning of disputed language, even though such language may not be strictly *in pari materia*. An examination of the Revised Laws of Hawaii, 1955, in effect when the Hawaii Supreme Court was called upon to decide the instant case and, so far as our cited examples are concerned, identical with what is contained in the Revised Laws of Hawaii, 1945, discloses certain instances of legislative use of the phrase “anything of value” or the use of substantially similar phraseology.

The first is taken from Chapter 288 of the Revised Laws of Hawaii, 1955, entitled Gambling, Lottery. Section 288-16, *supra*, provides that:

“Whoever by playing at cards or other game, or by betting on the sides or hands of those who do play, loses any sum of money, or *thing of value*, and pays or delivers the same or any part thereof, may sue for and recover the money or

value of the thing so lost and paid or delivered, from the winner thereof." (Emphasis added.)

Nothing of the language of the said Section 288-16 indicates a legislative intention to exclude from its scope any of the acts prohibited by Section 11343 of the Revised Laws of Hawaii, now Section 288-4 of the Revised Laws of Hawaii, 1955. The so-called gambling statute under which appellant was charged provides that:

"Every person who deals, plays or carries on, opens or causes to be opened, or who conducts either as owner or employee, whether for hire or not, any game of faro, monte, roulette, tan, fan tan, or any banking or percentage game played with cards, dice, or any device for money, checks, credit or *anything representative of value* or any other game in which money or *anything of value* is lost or won, and every person who plays or bets at or against any such prohibited game or games and every person present where such game or games are being played or carried on, is guilty of a misdemeanor." (Emphasis added.)

Obviously, under both statutes quoted above, the only thing that a player can lose under the agreed statement of facts, is the coin he places in the pinball machine. Conversely, the only thing that the owner of the machine can lose is one or more free games. In the event that the player loses under Section 288-16, *supra*, he may recover the coin that he lost. In the event that the player wins, the owner, then being the loser, can sue to recover the value of the free game or games lost. A corollary to the latter contingency

is that there must be a determination of the value of a free game in monetary terms, which must be something less than the coin used to play the game in the first instance. Obviously, any enforcement of Section 288-16, *supra*, as applied to pinball machines under the facts agreed to would lead to an absurdity and therefore Section 288-16 cannot be so construed by virtue of Section 1-18 (c), *supra*, which provides that: "Where the words of a law are ambiguous: . . . Every construction which leads to an absurdity shall be rejected."

Admittedly, the legislature could have stated that a "loser" may sue to recover what he lost or the value of it from a "winner" with the exception of pinball machine games where only free games are awarded to a successful player, assuming that such games are prohibited by Section 11343, *supra*. There is no language in the said Section 288-16 indicating that only some "losers" could have the benefit of that act. The language is "*whoever* loses" may sue. And whether the said Section 288-16 is considered *in pari materia* to the said Section 11343, the Court should examine it in trying to determine the meaning of the said Section 11343. And if it does, it must conclude that the legislature must have intended to give the said Section 11343 a more restricted meaning insofar as to what is meant by "anything of value."

Other instances of legislative use of the disputed phrase "anything of value" can be found in Title 31 of the Revised Laws of Hawaii, 1955, which can be denominated the Hawaiian Criminal Code. It is used,

for example, in the following sections of said Title 31. Section 281-1 provides: "If any person who is intrusted with, or has the possession, control, custody or keeping of *a thing of value* of another . . . he is guilty of the embezzlement of that thing." (Emphasis added.)

Section 283-1 provides: "Extortion is the wresting of *anything of value* from another by duress, menace, or by any undue exercise of power." (Emphasis added.)

Section 288-7 provides: "Every person who by the game of 'three card monte,' 'shell game' or any other game, device, sleight of hand, pretension of fortune telling, trick or other means whatever by use of cards or other implements or instruments, or while betting on sides or hands of any such play or game, fraudulently obtains from another person money or *anything of value*, is guilty of a misdemeanor." (Emphasis added.)

Section 289-19 provides: "Every person who obtains, or attempts to obtain, from any other person or persons any money, property, credit or *other valuable thing*, by means . . ." (Emphasis added.)

Section 306-1 provides: "Robbery is the stealing of *a thing* from the person of another or from his custody in his presence, by force or putting him in fear." (Emphasis added.)

In all of the statutory provisions above quoted, obviously the phrase "thing of value" or "anything of value" did not cover free games awarded to play pin-

ball machines because such construction would be absurd. And such provisions though perhaps not *in pari materia* to Section 11343, *supra*, are within the Criminal Code, and should be used by the courts in resolving legislative ambiguity. Where the legislature has repeatedly used the same words, there is at least a strong inference, if not a presumption, that the legislature intended them to have the same meaning in each instance, at least in the absence of clear, contrary manifestation of intention. 50 Am. Jur. 259, 260, Sections 271 and 272. Such an inference is a compelling one in the instant case as all of the quoted sections of the Criminal Code using the phrase "anything of value" or "thing of value" treat it as having the same meaning with the exception of the meaning that the Hawaii Supreme Court gives it in interpreting Section 11343, *supra*.

Not only should the Hawaii Supreme Court have considered related statutes but it should have also considered the same statute, in which the disputed phrase appears in its entirety. And, as hereinbefore stated, the issues involved under this specification could not properly be limited to an interpretation of "anything of value" but whether the charge stated facts sufficient to show a violation of Section 11343, *supra*.

Section 11343 of the Revised Laws of Hawaii, 1945, now Section 288-4 of the Revised Laws of Hawaii, 1955, under which appellant was charged, provides:

"Every person who deals, plays or carries on, opens or causes to be opened, or who conducts

either as owner or employee, whether for hire or not, any game of faro, monte, roulette, tan, fan tan, or any banking or percentage game played with cards, dice or any device for money, checks, credit or *anything representative of value* or any other game in which money or *anything of value* is lost or won, and every person who plays or bets at or against any such prohibited game or games and every person present where such game or games are being played or carried on, is guilty of a misdemeanor." (Emphasis added.)

Apparently the so-called gambling statute makes a distinction as to the stakes gambled for, depending on whether certain enumerated games are played or whether "any other game" is played. As to the former, the stakes must be "money, checks, credit or anything *representative of value*." As to the latter, the stakes must be "money or anything of value." If the Hawaii Supreme Court is right when it states, *arguendo*, after denying that any game need be *ejusdem generis* with the enumerated games, that the pinball machine game was a "banking" game and hence one of the enumerated games, then the stake involved must be "anything representative of value." *Territory v. Uyehara*, *supra*. It would require some strenuous mental gymnastics to find "anything representative of value" when free games only are awarded without the intermediate use of slugs, tokens or the like. Slight reflection is enough to convince any reasonable person of the difficulties involved in the application of different stakes depending upon the type of game played. Judicial construction literally of the involved

statute could easily result in an absurdity, a result which cannot be assumed as intended by the legislature. Obviously, the courts, to avoid an absurd construction, must construe both terms to be substantially equivalent. And where a penal statute is involved, the courts must construe the statute strictly and accept the construction most favorable to the accused. Or, as it is stated,

“It has long been a well settled general rule that penal statutes are subject to a strict construction. More accurately, it may be said that such laws are to be interpreted strictly against the state and liberally in favor of the accused. . . .”

50 Am. Jur. 430, Sec. 350.

“In the interpretation of a penal statute, the tendency is to give it careful scrutiny, and to construe it with such strictness as to safeguard the rights of the defendant. If the statute contains a patent ambiguity, and admits of two reasonable and contradictory constructions, that which operates in favor of a party accused under its provisions is to be preferred, and where there is any well-founded doubt as to any act being a public offense, it should not be declared such, but should rather be construed in favor of the liberty of the citizen. Hence, penal statutes are not to be extended in their operation to persons, things, or acts not within their descriptive terms, or the fair and clear import of the language used. . . .”

50 Am. Jur. 435, Sec. 409.

This principle of strict construction of penal statutes has been applied by many of the courts in pinball

machine cases, including *State v. Waite*, supra, *Gayer v. Whelan*, supra, *State v. One Bally Coney Island No. 21011 Gaming Table*, supra, and *State v. One "Jack and Jill" Pinball Machine*, supra. This rule of construction applied to the said Section 11343 would require the courts to narrow the meaning of "anything of value" to make it no broader than "anything representative of value" regardless of whether pinball machine games are considered within the meaning of the enumerated games or not.

It is respectfully submitted that the Supreme Court of the Territory of Hawaii was manifestly in error when it held in *Territory v. Uyehara*, supra, that free games awarded for successful play of pinball machines were within the meaning and intendment of Section 11343, supra, grounding its holding on the language of the phrase "anything of value" and in not determining that the said phrase in and of itself was ambiguous and was certainly so even when considered with reference to any other language contained in that same section; that the said Supreme Court was in error in not resorting to legislatively imposed guides for construction of statutes, in not considering other legislation using the same or a substantially similar phrase and in not treating the said Section 11343 as penal and therefore required to be strictly construed in favor of the accused. The Supreme Court was also in error in treating the specifications as involving solely the meaning to be given to the phrase "anything of value" and not, as is here urged, at least the construction of additional phrases of the

same statute, including "anything representative of value."

SPECIFICATION OF ERROR NO. 2.

THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN RULING THAT SECTION 11343 OF THE REVISED LAWS OF HAWAII, IS NOT VIOLATIVE OF APPELLANT'S CONSTITUTIONAL RIGHTS IN THAT SAID STATUTE IS VAGUE, INDEFINITE AND UNCERTAIN.

Section 11343 of the Revised Laws of Hawaii, 1945, under which appellant was charged, provides that:

"Every person who deals, plays, or carries on, opens or causes to be opened, or who conducts either as owner or employee, whether for hire or not, any game of faro, monte, roulette, tan, fan tan, or any banking or percentage game played with cards, dice or any device for money, checks, credit or anything representative of value or any other game in which money or anything of value is lost or won, and every person who plays or bets at or against any such prohibited game or games, and every person present where such game or games are being played or carried on, is guilty of a misdemeanor."

The Honolulu District Court ruled that the said statute was not void for indefiniteness and uncertainty. On appeal, the Hawaii Supreme Court upheld that ruling. We urge that both courts erred in so ruling.

The abstract principles applicable when a court is called upon to determine whether a particular statute is void for vagueness and indefiniteness are too well known as to require hardly any citation. It is stated in *Connally v. General Construction Co.*, 269 U. S. 365, 70 L. Ed. 322, 46 S. Ct. 126 (1926) that:

“A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another.”

In *Lanzetta v. New Jersey*, 306 U. S. 451, 83 L. Ed. 888, 59 S. Ct. 618 (1939), Mr. Justice Butler, speaking for the Court, said:

“It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression. (Citations omitted.) No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the state commands or forbids.”

Mr. Justice Butler then cites the *Connally* case with approval.

In *United States v. Cardiff*, 344 U. S. 174, 97 L. Ed. 200, 73 S. Ct. 189 (1952), it is stated:

“. . . The vice of vagueness in criminal statutes is the treachery they conceal in determining what persons are included or what acts are prohibited. Words which are vague and fluid (citations omitted) may be as much of a trap for the innocent as the ancient laws of Caligula. We cannot sanction taking a man by the heels for refusing to grant the permission which this Act on its face

apparently gave him the right to withhold. That would be making an act criminal without fair and effective notice. (Citation omitted.)”

In *American Communications Asso. v. Douds*, 339 U. S. 382, 94 L. Ed. 925, 70 S. Ct. 674 (1950), the court states:

“The applicable standard, however, is not of wholly consistent academic definition of abstract terms. It is, rather, the practical criterion of fair notice to those to whom the statute is directed. The particular context is all important.”

Many more of the so-called tests for determining statutory indefiniteness or vagueness can be called to the attention of the Court. Many cases can be cited where courts have struck down statutes on the ground of indefiniteness and uncertainty. On the other hand, the case books are filled with instances where statutory terms have been upheld where those terms have been alleged to be fatally indefinite and uncertain. See 83 L. Ed. 893 for illustrative criminal cases. Whatever the test applied by a particular Court called upon to determine whether particular statutory provisions were fatally vague, indefinite, or uncertain, in each instance the Court has scrutinized the provisions, both standing alone and in connection with the other provisions of the same statute. We urge that this Honorable Court do likewise and make a determination whether Section 11343, *supra*, as written, provides sufficient notice to the appellant.

Let us assume, as we must, a person in the position of the appellant, desirous of installing a pinball ma-

chine game awarding free games to successful players. Can such a person tell by an examination of Section 11343, that its provisions or any of them is violated by an installation of such a machine, to the extent required by the Constitution? Such a player in his examination might first notice that certain games are enumerated. They are faro, monte, roulette, tan, fan tan, or any banking or percentage game. He might conclude reasonably that a pinball machine game is a banking game as the Hawaii Supreme Court has done so in *Territory v. Uyehara*, supra. It certainly is not any of the others. Then he would notice that these enumerated games must be played with cards, dice or any device. He could conclude that a pinball machine is a "device." If a pinball machine game is one of the enumerated games and a pinball machine is a device, then, according to the statute, the game must be played for money, checks, credit or anything representative of value. Is a free game any of them? It would require great imagination for him to so conclude. If a free game is anything of value, what represents it? Here there is no slug, token, coupon or anything tangible. Such a person could reasonably conclude that the statute did not prohibit the particular activity at least if it were one of the enumerated games.

Let us assume, further, that such a person goes on to examine the phrase "or any other game in which money or anything of value is lost or won." It is obvious that *anything of value* is not synonymous with *anything representative of value*. If they differ

in meaning, as they appear to do, which is broader? Do the meanings overlap? Why did the legislature differentiate between an enumerated game and any other game? Even to a reasonable person there appears no good reason. These and other questions including the meaning of "anything of value" might well tax the resources of an experienced criminal lawyer. Complete bewilderment is the consequence when those questions are posed to a layman.

Enough has been said indicating the dilemma faced by the appellant. Has the crime as stated in the said Section 11343 been "so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue?" Does such a person have to speculate as to the meaning of the said statute? It is submitted that the said Section 11343 is so vague, indefinite and uncertain that prosecution of the appellant under it denies to him due process of law. The said statute requires him to guess not only as to the meaning of "anything of value" but also as to the meaning of "anything representative of value" and whether both phrases have different meanings. It also requires him to speculate whether the enumerated games are treated differently from "any other games," whether a "banking" game included pinball machine games, and the types of gambling paraphernalia that must be used in the play of "any other games." It is submitted that the said Section 11343 did not give the appellant sufficient notice that the operation and play of a pinball machine game wherein only free plays were awarded to

successful players violated its provisions or any one of them.

It should be borne in mind that the appellant does not contend that the legislature does not have power to prohibit the playing of pinball machine games, regardless of the type of "prizes" awarded or whether any prize at all were awarded, nor that the legislature does not have the power to prohibit manufacture or possession of pinball machines. Those questions and others that readily come to mind are not before us. The question before this Honorable Court is only whether Section 11343, *supra*, has constitutionally and effectively prohibited the use of pinball machine games where the only awards are free games to successful players without the use of slugs, tokens, or the like.

CONCLUSION.

For the reasons hereinabove set forth appellant respectfully submits that the judgment and sentence of the courts below should be reversed.

Dated, Honolulu, Hawaii, June 1, 1959.

Respectfully submitted,
HYMAN M. GREENSTEIN,
Attorney for Appellant.

(Appendix Follows.)

Appendix.

Appendix

Chapter 288, Gambling, Lottery.

Section 288-4, Revised Laws of Hawaii, 1955

(Formerly, Section 11343, RLH 1945)

“Playing prohibited games. Every person who deals, plays or carries on, opens or causes to be opened, or who conducts either as owner or employee, whether for hire or not, any game of faro, monte, roulette, tan, fan tan, or any banking or percentage game played with cards, dice or any device for money, checks, credit or anything representative of value or any other game in which money or anything of value is lost or won, and every person who plays or bets at or against any such prohibited game or games and every person present where such game or games are being played or carried on, is guilty of a misdemeanor.”

No. 16,393

IN THE

**United States Court of Appeals
For the Ninth Circuit**

DAVID NAUMU,

Appellant,

VS.

TERRITORY OF HAWAII,

Appellee.

Upon Appeal from the Supreme Court
for the Territory of Hawaii.

APPELLANT'S REPLY BRIEF.

HYMAN M. GREENSTEIN,

400 South Beretania Street,

P. O. Box 661, Honolulu, Hawaii,

Attorney for Appellant.

GREENSTEIN & FRANKLIN,

400 South Beretania Street,

P. O. Box 661, Honolulu, Hawaii,

Of Counsel.

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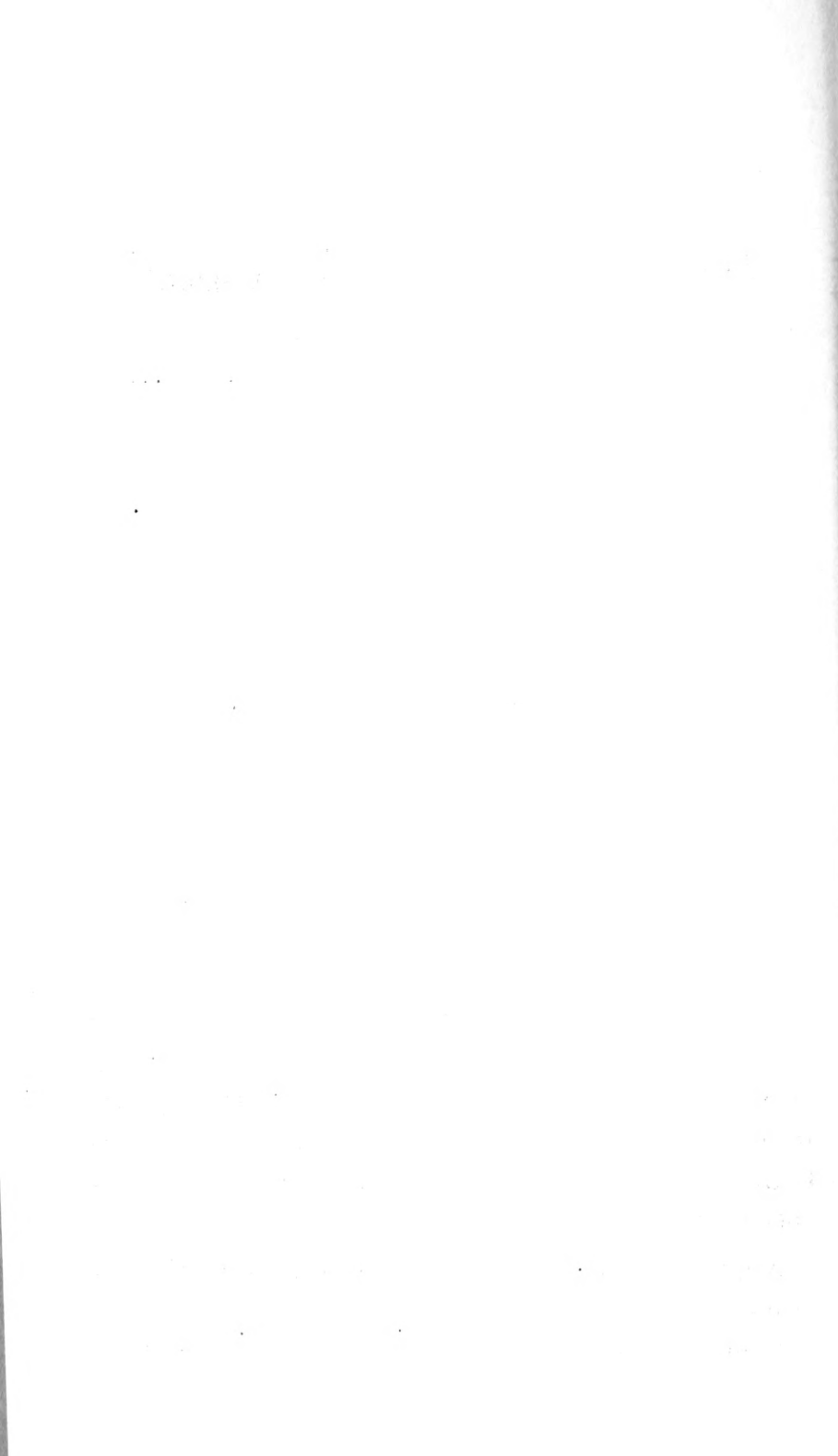
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No. 16,393

IN THE

**United States Court of Appeals
For the Ninth Circuit**

DAVID NAUMU,

Appellant,

VS.

TERRITORY OF HAWAII,

Appellee.

Upon Appeal from the Supreme Court
for the Territory of Hawaii.

APPELLANT'S REPLY BRIEF.

ARGUMENT OF THE CASE.

A. THIS COURT HAS JURISDICTION NOT ONLY TO HEAR THE CAUSE, BUT TO DECIDE ALSO WHETHER THE HAWAII SUPREME COURT WAS IN ERROR IN NOT HOLDING THE STATUTE VOID FOR UNCERTAINTY AND ALSO IN ITS INTERPRETATION THEREOF.

Although appellee, in its answering brief, talks in terms of the jurisdiction of this Honorable Court, what it apparently means is that the scope of review of this Court is a limited one as applied to appellant's first specification of error.

Apparently there is no real dispute as to the jurisdiction of this Court to review the cause. Appellee concludes its brief by intimating that the constitu-

tional question was raised only for the purpose of giving this Court jurisdiction, a conclusion no doubt arrived at by the brevity of appellant's argument thereon, apparently a conclusive criterion according to appellee, judging from the length of its answering brief.

Whether or not a bona fide constitutional question has been raised is for this Court to determine from its evaluation of the statute and applicable authorities cited. And if there is such a question raised it is undisputed that it may also review the question posed by appellant's first specification of error. *Municipality of Rio Piedras v. Serra, Garabis & Co., Inc.*, 65 F. 2d 691 (1933).

Insofar as the scope of review of this Court is concerned as applied to the first specification of error, it is admitted that deference must be given to the interpretation of the Hawaii Supreme Court of Section 11343 of the Revised Laws of Hawaii, 1945. As stated in *Pae v. Stevens*, 256 F. 2d 208 (1958):

“... The instant decision must be accepted insofar as it is in conformity with the Constitution and applicable statutes of the United States *and is not patently erroneous in statement or application of governing principles.* . . .” (Emphasis added.)

What is here urged is that the Hawaii Supreme Court did not merely err in following the minority rule in its interpretation of our “gambling” statute, but that it committed a manifest, fundamental error in arriving at its decision. It did not attempt interpreta-

tion of said statute by examination of its language and the language of related statutes (*Territory v. Uyehara*, 42 Haw. 184 (1958)) in plain disregard of statutory mandates of construction. *Revised Laws of Hawaii, 1955*, Sections 1-17, 1-18, and 1-21. It is submitted that failing to do so, it committed manifest error.

As indicative of its attitude toward its contention, appellee has argued for 36 pages on what it deems an *arguendo* question.

**B. THE SUPREME COURT OF THE TERRITORY OF HAWAII
ERRED IN RULING THAT THE CHARGE STATED FACTS
SUFFICIENT TO CONSTITUTE A VIOLATION OF SECTION
11343 OF THE REVISED LAWS OF HAWAII 1945.**

Without expressly indicating, appellee has substituted another issue than argued by appellant under its first specification of error. While we freely admit that this specification turns on the interpretation to be given Section 11343, *supra*, we do not admit to the propriety of appellee's narrowing of the issue stated and argued upon by appellant in its brief without first showing wherein appellant erred in its statement of the issue involved.

In its brief appellant argues that the majority rule was that "anything of value", or some similar phrase, excluded "free games" played on pin ball machines, that said phrase was ambiguous even standing alone and was certainly so when compared with other language of Section 11343, *supra*, and that the Hawaii Supreme Court should then have attempted construc-

tion of the said section using statutory guides to construction as well as other well-recognized guides.

Appellant called attention to the use of the phrase "anything representative of value", inviting comparison with "anything of value", quoted from other Hawaii statutes using similar phraseology, invoked certain well-recognized rules of construction and concluded that Section 11343, *supra*, could not be interpreted to penalize pin ball machine games where free games only were awarded.

What apparently appellee has done is to argue that a free game won on a pin ball machine is "anything of value" and that a pin ball game is "any other game" within the meaning of Section 11343, *supra*. In support therefor, it has cited cases using phraseology equivalent to "anything of value", argued that cases favorable to appellant can be distinguished, submitted dictionary definitions of "value" and indicated that Section 11343, *supra*, is the result of several amendments.

Not a word was said as to whether "anything representative of value" differs from "anything of value", whether a pin ball machine game is a "banking" game, and whether use of phraseology in other Hawaii statutes using phraseology substantially equivalent to "anything of value" tended to throw light on the meaning to be given Section 11343, *supra*, as a whole.

In fact, the language of the very statute in issue was carefully skirted by appellee. While cases from other jurisdictions were liberally offered, not a single

one was offered interpreting a statute having language like Section 11343, *supra*, wherein apparently different standards of "value" are used depending on whether a "game" was specifically enumerated or not.

While appellant does not believe that the issue involved has been squarely met, it does not admit that appellee is correct even on its own narrower issue.

Further, appellant does not concede to the propriety of factual occurrences being stated not contained in the agreed statement of facts or not judicially noticeable, nor that dictionary meanings providing for every possible contingency are helpful, and neither does appellant concede that citation of predecessor statutes to Section 11343, *supra*, have any bearing on the issue involved, in the absence of a clearer showing that the changes threw light on the problem herein. While appellant is now convinced that gambling is an evil, it is not convinced that there are not greater evils extant, and that legal briefs are proper media for delivery of sermons.

For the reasons given herein and in its opening brief, appellant submits that it has shown that the Hawaii Supreme Court has committed manifest error in holding that the charge herein stated facts sufficient to constitute a violation of Section 11343 and that appellee in its answering brief has not shown otherwise.

**C. THE SUPREME COURT OF THE TERRITORY OF HAWAII
ERRED IN RULING THAT SECTION 11343 OF THE REVISED
LAWS OF HAWAII, IS NOT VIOLATIVE OF APPELLANT'S
CONSTITUTIONAL RIGHTS IN THAT SAID STATUTE IS
VAGUE, INDEFINITE AND UNCERTAIN.**

Again, as with its discussion of the first specification of error, appellee has misconceived appellant's argument on the second specification of error. In its brief appellant cited several cases for the general propositions therein stated, and further stated that in every case the reviewing Appellate Court has looked to the statutory language itself along with related statutes and made a determination whether fair notice has or has not been given of prohibited conduct.

In its answering brief, appellee again goes on a case-examining spree and, again has failed to cite one case involving the same language. Paradoxically, it urges for a strict construction of Section 11343 in one breath and then in the other breath states that Courts should adopt that construction which would save the statute. As before, appellee has demonstrated that cases cited and quoted by appellant are not in point, a proposition already admitted. Notwithstanding, appellee has countered with more cases without any admission that they are not in point. Apparently its theory is that more cases not in point will prevail over less cases not in point. What appellee has not done is to examine statutory language and the factual situation involved as appellant has done, and as this Honorable Court must do and apply them to the general principles derived from those cases.

The extent of the confusion in appellee's mind is illustrated by what it states on page 49 of its brief, in substance that appellant is strenuously contending that a pin ball machine game is neither a game specifically enumerated in Section 11343, *supra*, or "any other game". Appellant admits it is one or the other. It admits confusion, however, as to which it is. The Hawaii Supreme Court in *Territory v. Uyehara*, *supra*, somewhat gratuitously, stated that it is a "banking" game, something we do not intend to dispute, for then the relevant inquiry is not whether a "free game" is "anything of value" but whether it is "anything representative of value". The point of our discussion there as with other subjects is that there is considerable uncertainty in determining just what is prohibited by Section 11343, *supra*.

For the reasons stated in our opening brief, appellant submits that Section 11343, Revised Laws of Hawaii, 1945, if construed to include free games played on pin ball machine games within its ban, is unconstitutional, because too vague, indefinite and uncertain according to traditional concepts of due process of law.

CONCLUSION.

For the reasons hereinabove set forth appellant respectfully submits that the judgment and sentence of the Courts below should be reversed.

Dated, Honolulu, Hawaii,

October 1, 1959.

Respectfully submitted,

HYMAN M. GREENSTEIN,

Attorney for Appellant.

GREENSTEIN & FRANKLIN,

Of Counsel.

No. 16,393

IN THE

**United States Court of Appeals
For the Ninth Circuit**

DAVID NAUMU,

VS.

TERRITORY OF HAWAII,

Appellant,

Appellee.

**Upon Appeal from the Supreme Court
for the Territory of Hawaii**

APPELLEE'S ANSWERING BRIEF

JOHN H. PETERS

Prosecuting Attorney

FREDERICK J. TITCOMB

Deputy Prosecuting Attorney

City and County of Honolulu

Honolulu, Hawaii

Attorneys for Appellee.

FILED

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APPELLEE'S ANSWERING BRIEF

STATEMENT OF JURISDICTION

Appellee submits that this Court assumes jurisdiction of this matter only insofar as appellant attacks the constitutionality of the statute on the grounds that the same is vague, indefinite and uncertain whereby he has been denied due process of law.

STATEMENT OF THE CASE

Appellee does not controvert appellant's statement of the case.

ARGUMENT OF THE CASE

ISSUE INVOLVED

The only issue presented to the Court is whether or not Section 11343, *Revised Laws of Hawaii*, 1945, is so vague, indefinite and uncertain as to deny anyone charged thereunder due process of law.

- A. NO MANIFEST ERROR WAS COMMITTED BY THE SUPREME COURT OF HAWAII IN RULING (1) THAT FREE GAMES WON ON A PIN BALL MACHINE CONSTITUTE "ANYTHING OF VALUE" AND (2) THAT A GAME PLAYED ON SUCH MACHINE IS WITHIN THE PURVIEW OF "ANY OTHER GAME" AS CONTEMPLATED BY SECTION 11343, REVISED LAWS OF HAWAII, 1945.

It is respectfully submitted that on matters brought before it this Court should not entertain argument nor render a decision reversing the Supreme Court of Hawaii in construing the applicability of Section 11343, *Revised Laws of Hawaii*, 1945, unless there is a showing that some substantial federal question is in issue, or where the lower court is shown to have committed patent or manifest error.

The jurisdiction of this Court is clearly set forth in *USCA*, Title 28, Section 1293, which states the following:

"The court of appeals . . . shall have jurisdiction of appeals from all final decisions of the supreme court . . . of . . . Hawaii, respectively in all cases *involving the Constitution, laws or treaties of the United States* or any authority exercised thereunder . . ." (Emphasis added.)

From the foregoing it is submitted that the jurisdiction of the Court of Appeals is a limited one. See

also: *Alford v. Territory of Hawaii*, 205 F. 2d 616; *Fukunaga v. Territory of Hawaii*, 33 F. 2d 396; *Pae v. Stevens*, 256 F. 2d 208; *Pioneer Mill Co. v. Victoria Ward*, 158 F. 2d 122; *Waialua Agr. Co. v. Christian*, 305 U.S. 91, 59 S. Ct. 21, 83 L. Ed. 60; *Young v. Territory of Hawaii*, 160 F. 2d 289.

This Court in the *Stevens* case, *supra*, on page 212 stated:

“This Court adheres strictly to its limited power to review a decision of the Supreme Court of Hawaii. The instant decision must be accepted insofar as it is in conformity with the Constitution and applicable statutes of the United States and is not patently erroneous in statement or application of governing principles. . . . *We will not impose our preference for a rule of law upon Hawaii.* Therefore, *this Court will not interfere unless there has been a clear departure from ordinary legal principles.*” (Emphasis added.)

In the *Victoria Ward* case, *supra*, this Court maintained its aloofness because there was no showing of “manifest error.”

Likewise, in the criminal case of *Young v. Territory of Hawaii*, *supra*, this Court refused to test the decision of the Hawaii court in permitting its trial court to charge the jury with a somewhat confusing definition of reasonable doubt. This Court stated the following on page 290:

“... The due process clause of the Fourteenth Amendment ‘leaves the states free to enforce their criminal laws under such statutory provisions and common law doctrines as they deem

appropriate. . . .’ And the same holds good of the Fifth Amendment in respect of the administration of the criminal laws of the Territory of Hawaii. . . .”

Based upon the precedent established by this Court of Appeals it is respectfully submitted that appellant cannot here renew his argument that free games won on a pin ball machine do not constitute “anything of value,” and that the phrase, “any other game,” contained in Section 11343 of the *Revised Laws of Hawaii*, 1945, included such games as that played on pin ball machines.

However, the Supreme Court of Hawaii decided to construe the meaning of the two phrases in question is a matter peculiar to its own jurisdiction. Appellant, in order to renew his argument before this Court, must show that the court below was in grave error. This he cannot do, for there is sufficient authority to sustain the position taken by the Hawaii court. Among the authorities which construed the phrases as did the Hawaii court are the following:

Baedar v. Caldwell, 156 Neb. 489, 56 N.W. 2d 706 (1953);

Eccles v. Stone, 134 Fla. 113, 183 So. 628 (1938);

Middlemas v. Strutz, 71 N.D. 186, 299 N.W. 589 (1941);

Prickett v. State, 200 P. 2d 457; Rehearing Denied, 201 P. 2d 798 (Okla. 1949);

People v. Gravenhorst, 32 N.Y.S. 2d 760 (N.Y. 1942);

- State v. Bally Beach Club Pinball Machine*, 119 A. 2d 876 (Vt. 1956);
State v. Langford, Tex. Civ. App., 144 S.W. 2d 448 (Tex. 1940);
Thamart v. Moline, 66 Idaho 110, 156 P. 2d 187 (1945);
Westerhaus, Inc. v. City of Cincinnati, 127 N.E. 2d 412, Aff'd 165 Ohio St. 327, 135 N.E. 2d 318 (1956).

These cases, decided under statutes specifically using the terms, "thing of value," "other thing," or "anything of value," have held that free games won on pin ball machines were within the meaning of those statutory terms:

- Antrim v. State*, 92 Okla. Cr. 91, 220 P. 2d 846 (1950);
Broadbuss v. State, 141 Tex. Cr. Rep. 512, 150 S.W. 2d 247 (1941);
Giomi v. Chase, 47 N.M. 22, 132 P. 2d 715 (1942);
Hightower v. State, Tex. Civ. App. 156 S.W. 2d 327 (1941);
People v. Cerniglia, 11 N.Y.S. 2d 5 (1939);
Prickett v. State, 88 Okla. Cr. 232, 201 P. 2d 798 (1949);
Rankin v. Mills Novelty Co., 182 Ark. 561, 32 S.W. 2d 161 (1930);
State v. Paul, 43 N.J. Super. 396, 128 A. 2d 737 (1957);
Steely v. Commonwealth, 291 Ky. 554, 164 S.W. 2d 977 (1942).

These cases, decided under statutes prohibiting gambling or gambling devices, held that free games won on pin ball machines are "things of value":

Alexander v. Martin, 192 S.C. 176, 6 S.E. 2d 20 (1939);

Couch v. State, 110 P. 2d 613 (Okla. 1941);

People v. One Pinball Machine, 316 Ill. App. 161, 44 N.E. 2d 950 (1942);

State v. Doe, 242 Iowa 458, 46 N.W. 2d 541 (1951);

State v. Wiley, 232 Iowa 443, 3 N.W. 2d 620 (1942).

See also:

Calcutt v. McGeachy, 213 N.C. 1, 195 S.E. 49 (1938);

Harvie v. Heise, 150 S.C. 277, 148 S.E. 66 (1928);

Henry v. Kuney, 280 Mich. 188, 273 N.W. 442 (1937);

Holliday v. Governor of State of South Carolina, 78 F. Supp. 918 (1948);

Kraus v. City of Cleveland, 135 Ohio St. 43, 19 N.E. 2d 159 (1939);

Painter v. State, 163 Tenn. 627, 45 S.W. 2d 46, 81 A.L.R. 173 (1932);

Stanley v. State, 194 Ark. 483, 107 S.W. 2d 532 (1937);

State v. Baitler, 131 Me. 285, 161 Atl. 671 (1932);

State v. One 5¢ Fifth Inning Baseball Machine, 3 So. 2d 27 (Ala. 1941).

There is no dispute that authority can be presented disagreeing with the construction as rendered by the court below. It is conceivable that this Court, like appellant, is likewise in disagreement with the decision in *Territory v. Uyehara*, 42 Haw. 184. However that may be, it is respectfully submitted that, for want of proper jurisdiction in that particular, appellant's Specification of Error No. 1 should be dismissed.

B. FREE GAMES WON ON A PIN BALL MACHINE CONSTITUTE "ANYTHING OF VALUE" AS PROVIDED BY SECTION 11343, REVISED LAWS OF HAWAII, 1945.

In the event this Court entertains jurisdiction as to appellant's Specification of Error No. 1, the following argument is included in this brief.

It is respectfully submitted that the majority and better reasoned rule is that free games won on a pin ball machine constitute "anything of value" within the meaning of Section 11343, *Revised Laws of Hawaii*, 1945, (now Section 288-4, *Revised Laws of Hawaii*, 1955).

1. Statute and Definitions.

The statute in question provides as follows:

"Playing prohibited games. Every person who deals, plays, or carries on, opens or causes to be opened, or who conducts either as owner or employee, whether for hire or not, any game of faro, monte, roulette, tan, fan tan, or any banking or percentage game played with cards, dice or any device for money, checks, credit or any repre-

sentative of value or any other game in which money or *anything of value* is lost or won, and every person who plays or bets at or against any such prohibited game or games, and every person present where such game or games are being played or carried on, is guilty of a misdemeanor.” (Emphasis supplied.) Sec. 11343, *R.L.H.* 1945.

The word “anything,” when used as a noun, has been defined as a “thing of any or whatever kind.” *Webster’s New Int. Dict.*, 2d Ed.

The word “thing” though relating to physical objects when taken in its narrower sense, yet when used in a broader sense includes that which is intangible. In this latter context it has been defined as:

- “ 2c. A happening; event; circumstance; . . .
- “ 3. Something accomplished or to be accomplished; a deed, act, or transaction; . . .
- “ 4b. The end or aim of effort or activity; . . .
- “ 5. Whatever exists, or is conceived to exist, as a separate entity, or as a distinct and individual quality, fact, or idea; any separable or distinguishable object of thought; anything at all; as there is a name for every *thing*.” *Webster’s New. Int. Dict.*, 2d Ed.

The word “value” has been defined as:

- “ 1. A fair return in money, goods, services, etc., for something exchanged; that which is considered an equivalent in worth; as, to get the *value* of one’s money in a purchase; to recover the *value* of lost merchandise.
- “ 2. Monetary worth of a thing; . . .

“ 5. Relative worth, importance, or utility; degree of excellence or usefulness; status in a scale of preferences or the like; . . .

“14d. The estimate which an individual places upon some of his possessions as compared with others, independently of any intent to sell;—sometimes called *subjective value*, or, less correctly, *value in use*, and employed in a loose sense as nearly equivalent to *utility*.”
Webster's New Int. Dict., 2d Ed.

“The utility of an object in satisfying, directly or indirectly, needs or desires of human beings, called by economists ‘value in use;’ or its worth consisting in the power of purchasing other objects, called ‘value in exchange.’” *Black's Law Dict.*, 3d Ed.

The phrase “any . . . thing of value” has been held to be not limited to tangibles:

“ . . . Character, esteem, appreciation, reputation and good will are definitely things of value to those who possess them. The word ‘thing’ is defined as that which is or may become the object of thought; that which has existence or is concerned or imagined as having existence; any object, substance, attribute, idea, fact, circumstance, event, etc. A thing may be material or ideal, animate or inanimate, actual, possible or imaginary. Words and Phrases, Perm. Ed., p. 558; Funk & Wagnalls New Standard Dictionary; The Century Dictionary and Cyclopedia; Webster's Universal Unabridged Dictionary. The same authorities define ‘value’ as the ‘estimate of the intrinsic worth of a thing; appreciation, esteem, valuation.’ A political benefit which a defendant

expected to receive for reinstating a constituent was held to be embraced within the clause, 'value of any kind'. *People ex rel. Dickinson v. Van De Carr*, 87 App. Div. 386, 389, 84 N.Y.S. 461, 463. In construing the same clause the court in *People v. Hyde*, 156 App. Div. 618, 141 N.Y.S. 1089, 1093, held that something of value must flow to defendant, not necessarily of pecuniary or intrinsic value, but value in the sense of a personal advantage of some sort.

"With these concepts in mind, this court is constrained to hold amusement a thing of value when applied to devices of this type [pin ball machines]. A thing of value to be the subject of gaming may be anything affording the necessary lure to indulge the gambling instinct. . . ." *People v. Gravenhorst*, *supra*, pp. 774-775.

Text authorities also have discussed the meaning of the term "thing of value" as applied to coin operated devices of the type in question:

". . . The term 'thing of value,' as used in statutes prohibiting, in effect, coin operated slot machines upon which such a thing may be won or played for, has been construed by some courts to include additional plays automatically won on machines commonly referred to as pinball marble, or bagatelle game machines so as to render these machines unlawful by reason of such charges, notwithstanding that no tokens, slugs, checks, or the like are used in connection with the replays, and even though no money, prizes, or similar awards are made to successful players . . ." 24 *Am. Jur., Gaming & Prize Contests*, Sec. 35, Supp., p. 43.

“*Thing of value or valuable thing.* The phrase has been held to include amusement generally and particularly that afforded by the ‘free game’ feature of some gaming devices, and more specifically where the amount of amusement is determined by chance or hazard.” 38 *C.J.S., Gaming*, Sec. 1, p. 72.

The reasoning upon which the foregoing holdings are premised, when applied to free games won by a player upon a pin ball machine, is that such free games constitute *amusement*, and amusement is a “thing of value.” If a player is willing to insert a nickel in the machine to play one game, then that game has a value of five cents to him—its equivalent worth—otherwise he would not part with his money to play such a game. As to him the game has “utility” in that it directly or indirectly satisfies his want for amusement. Though such amusement has no “value in exchange” in the sense that it can be bought, sold, transferred or exchanged like merchandise, money or choses in action, yet it has a subjective value or “value in use” to the player. It follows that if one game is worth five cents to a player, then additional free games which he may win by playing such a pin ball machine and obtaining a certain score thereon are worth at least five cents apiece. They constitute additional amusement in the same form and kind as purchased with the original five cents and hence have additional value. The possibility of winning such free games is the inducement for the player to insert his original five cent coin to play the machine.

The fact that some people might not place any value upon such a form of amusement is no criteria in determining whether they do or do not constitute value within the meaning of our gaming statute. Most people have different tastes and preferences for amusement. Some like theatres, television, radio, sports, reading or other pastimes. It is enough for purposes of the statute in question that some people consider amusement derived from playing a pin ball machine sufficiently valuable to deposit their money in such machines in the hope and expectation of receiving additional free games upon attaining a certain score.

In this connection it has been held with respect to a machine which upon the insertion of a coin and pulling of a lever a package of mints is ejected along with a varying number of slugs or tokens which can be reinserted into the machine for additional free replays:

“Amusement is a thing of value. Were it not so, it would not be commercialized. The less amusement one receives, the less value he receives, and the more amusement, the more value he receives. Whoever plays the device and obtains tokens therefrom receives more value for his nickel, with respect to the amount of amusement obtained, than the player who receives none at all. The player who receives ten tokens receives more value for his nickel, with respect to the amount of amusement, than the player who receives only two. The player who receives fifty tokens receives more value for his nickel, with respect to the amount of amusement, than the player who receives only ten tokens. However, the number of

tokens a player may receive is wholly dependent upon chance. Consequently, the amount of amusement a player receives for his nickel, by virtue of the return of the tokens, is dependent wholly upon chance. The greater the amount of amusement received, the more valuable the prize.

“The minimum amount of amusement offered in each play is that which is offered without any return of tokens. Whatever amusement is offered through the return of tokens is added amusement which a player has an uncertain chance of receiving. This added amount of amusement, the procurement of which is dependent wholly upon chance, is a thing of value [citing cases], the lure extended by the device to the player.

“As well said in the opinion in *Myers v. City of Cincinnati*, 128 Ohio St. 235, 190 N.E. 569, 570: ‘These decisions [holding certain slot machines to be gambling devices] appear generally to be based on the theory that devices of this kind encourage and stimulate the gambling instinct of receiving something for nothing, or more for less, and are in such contravention of sound public policy as to come within laws relating to gambling and the exhibition of gambling devices. . . .’ *Kraus v. City of Cleveland*, *supra*, pp. 160-161.

As applied to gaming devices, a “thing of value” to be the subject of gambling may be any “thing” affording the necessary lure to individual gambling instincts, that is, the receiving of something for nothing, or more for less. *Heartley v. State*, 178 Tenn. 254, 157 S.W. 2d 1, 3 (1941); *Steely v. Commonwealth*, *supra*, p. 980; *People v. Gravenhorst*, *supra*, p. 775;

Colbert v. Superior Confection Co., 154 Okla. 28, 6 P. 2d 791, 793 (1931).

2. History of Gaming Devices and Cases.

It is submitted that the weight of authority holds amusement to be a thing of value as applied to pin ball or marble machines and that additional free games won on such machines constitute amusement and hence are "anything of value."

In this connection it should be noted that there are a number of early cases applying the principle in question to machines that were somewhat similar to and which were the predecessors of the pin ball machines now under consideration, these machines being known as the "Mills" type of mint vending machines. These mint vending machines were but one of a procession of machines which since the turn of the century have been introduced to the public by the slot machine interests and have ultimately received judicial condemnation by the courts. The history of these machines and their subsequent encounters with the law is graphically illustrated in *People v. Gravenhorst*, *supra*, pp. 764-765.

In that case the court discussed the familiar one-armed bandit, which paid off to the winner in actual money and which was soundly denounced by the courts.

To nullify the effects of such judicial censure, the slot machine interests eliminated the pay-offs in money and substituted therefor the return to the successful player of additional merchandise, slugs or tokens, the

latter being exchangeable for games, mints, cigars, etc. These machines were also condemned by the courts.

In a further ramification designed to avoid judicial disapprobation based upon the element of chance incorporated into such slot machines, the manufacturers proceeded to introduce a device that would indicate to the operator in advance exactly what the pay-off would be. This subterfuge, however, was held to be of no avail, inasmuch as the player gambles not so much on the immediate return but on the expectation that the indicator will show an opportunity for profit on his next play. Such a machine was stricken down by the New York courts and also by this Court in *Territory v. Beeson*, 23 Haw. 445 (1916).

Turning to the mint vending machines of the Mills type, the court in *People v. Gravenhorst*, *supra*, states further at page 765:

“In their ceaseless endeavors to circumvent legislative and judicial condemnation, the contrivers next developed a machine resembling a cash register with a lever on the side, and in the front, a column of packages of mints. Upon the deposit of a coin and the operation of the lever a package of mints was released. In addition the machine caused three cylinders to revolve at different rates of speed. Upon each cylinder were certain symbols and an incomplete sentence. The inscriptions on the three, however, when the cylinders ceased to spin and when these inscriptions were read together, formed complete sentences of a humorous vein. These machines sometimes delivered metal tokens which were purported to have no cash or trade in value and to be capable of use only

for further amusement. These types of machines were declared illegal in numerous State and Federal decisions. [Citing cases.] . . .”

A number of cases including some of those cited in the *Gravenhorst* decision, *supra*, have held that the slugs or tokens won on such devices represent the right to continue the operation of the machine and hence were “things of value” within the meaning of statutes directed against gaming. *Painter v. State*, *supra*; *Howell v. State*, 184 Ark. 109, 40 S.W. 2d 782 (1931); *Rankin v. Mills Novelty Co.*, *supra*; *State v. Baitler*, *supra*, p. 286; *Harvie v. Heise*, *supra*; *Heartley v. State*, *supra*. See also: *Ross v. Goodwin*, 40 F. 2d 535 (D.C., N.H.); 24 *Am. Jur., Gaming & Prize Contests*, Sec. 35, *supra*.

Though the mint vending machines just described are not precisely the same in construction and operation as pin ball machines, yet the principle of law involved applies to each type of machine with equal force. From a mechanical standpoint, the only difference between mint vending machines and pin ball machines is in the method of obtaining the free play. In the mint vending machine the mechanism emitted slugs or tokens, which, though of no intrinsic value in themselves, entitled the player to a free play, said right being attained by inserting the slugs or tokens back into the machine and securing additional replays thereon. In contradistinction to this, the more modern pin ball machines in use today emit no slugs or tokens. However, by virtue of the mechanism within a pin ball machine, free games when won by the player

upon attaining a certain score are registered automatically on the machine by an indicator, counter, illuminated numerals or other device, and the games are then played off automatically. In principle, this difference in the method of awarding the free games to the player is immaterial, since on either machine the player receives additional amusement which is contingent upon chance or upon his attaining a certain score. The additional free plays in both cases constitute amusement and hence "a thing of value" within the meaning of statutes directed against gaming.

In this connection it has been said:

" . . . 'It matters little whether this right was evidenced by tokens or by an automatic recorded score. . . .'" *People v. One Pinball Machine, supra*, p. 954.

See also *Alexander v. Martin, supra*.

In discussing the early Ohio case of *Kraus v. City of Cleveland, supra*, wherein the machines therein considered were the Mills type of mint vending machine, it was held in a later decision, *Westerhaus, Inc. v. City of Cincinnati*, 127 N.E. 2d 412, 416 (1955), aff'd 165 Ohio St. 327, 135 N.E. 2d 318 (1956), relating to pin ball machines with the free game element:

" . . . As to this feature of the case, the only distinction between the Kraus case and the present case is that the right to replay the game in the Kraus case was dependent upon receiving a token from the machine when the established score was reached, whereas in the present case the right to

replay is established automatically without a token. The distinction is immaterial. The Kraus case was not decided upon this fine distinction of mechanics, but upon the principle that the *right* to replay the game constituted amusement and that *amusement* was a thing of value. Certainly the token which was merely the mechanical means by which the machine could be replayed, was of no inherent value in itself. The right to amusement afforded by the machine considered in the Kraus case is indistinguishable from the right to amusement afforded by both of the machines considered in the present case. . . .”

In short, the decisions of many jurisdictions passing upon the mint vending machines under gambling statutes using the term “thing of value” sustain the proposition that additional amusement in the form of free replays on such machines constituted “things of value.” Those decisions are also applicable to the case before the Court in relation to pin ball machines.

Turning to the cases which pass upon the question of whether free games won on pin ball machines constitute “things of value” it will be helpful to note that these cases fall into two broad categories:

(a) Those involving statutes which prohibit gaming, gambling or gambling devices generally without defining such terms and in which the court must resort to generally accepted definitions of those terms which in themselves contain the term “thing of value;” and

(b) Those involving statutory definitions of gambling or gaming and specifically use the terms “thing of value,” “other thing,” “any thing of value,” etc.

In respect to the first of the aforementioned classifications it has been held under statutes prohibiting gaming, gambling or gambling devices that free games won on pin ball machines are "things of value" within the judicial definitions of gaming, gambling or gambling devices. *State v. Wiley*, 232 Iowa 443, 3 N.W. 2d 620 (1942); *State v. Doe*, 242 Iowa 458, 46 N.W. 2d 541 (1951); *People v. One Pinball Machine*, *supra*, but see *People v. One Mechanical Device*, 142 N.E. 2d 98 (1957); *Alexander v. Martin*, *supra*; *Westerhaus, Inc. v. City of Cincinnati*, *supra*.

Thus it was held in *State v. Wiley*, *supra*, that a pin ball machine awarding free games to a player who attained a certain score thereon was a gambling device within the purview of a statute which forbade the possession of any "roulette wheel, klondyke table, poker table, punch board, faro, or keno layouts or any other machines used for gambling or any slot machine or device with an element of chance attending such operation."

The court was of the opinion that:

"If free plays of a mint-vending machine are things of value, it seems logical that free games upon a device such as those described in the indictment in this case are likewise things of value. Various authorities sustain this conclusion. As a matter of fact the play of the mint-vending machine presumably is merely accessory to the purchase of mints. The coin inserted in the pin ball machine presumably is paid solely for the amusement of operating the machine. Thus, the coin measures the value of the game. Therefore, a free game upon the latter machine has a definite fixed

value. If one game is worth a nickel, it is clear that additional games are things of value. And the rule is the same whether the machine emits discs with which it can be replayed or works automatically as in the case at bar.” *State v. Wiley, supra*, pp. 622-623.

The court finally held that free games won on such machines were “things of value.”

The foregoing case was followed in *State v. Doe, supra*, where in an action to condemn a pin ball machine as a gambling device, though the evidence in the trial court disclosed that no free games were given and that only a certain score could be attained, it was held that the machine was a gambling device. The only conclusion that the court could reach from the fact that extra points could be obtained by means of a feature which built up odds in the machine was that the score may be used to obtain money or other things of value. This feature supported the finding of the trial court that the machine was adapted and designed as a gambling device. In the opinion the court stated further that the machine was exhibited during the oral argument in the Supreme Court where members of the court played it and found that it awarded free games. In this connection the court held:

“ . . . The free game feature, which, the record indicates, was not shown in the trial court, in and of itself would stamp the machine as a gambling device . . .” *State v. Doe, supra*, p. 545.

In *People v. One Pinball Machine, supra*, in a proceeding against a pin ball machine with the free game

feature under a statute providing "Every . . . slot machine or other machine or device for the reception of money on chance or upon the action of which money is staked, hazarded, bet, won or lost is hereby declared a gambling device" it was held that:

" . . . Amusement is recognized by the Courts as a thing of value, and where the amount of amusement given by the player of a machine is determined by chance or hazard, such machine is held to be a gambling device." *People v. One Pinball Machine, supra*, p. 954.

The holding in this case apparently construed the statute just cited with another section which provided penalties for operating, keeping, owning, renting or using the above named device and includes in the same descriptive language after the word "money" the words "or other valuable thing." The court in quoting the case of *Kraus v. City of Cleveland, supra*, held amusement to be a thing of value, and were it not so it would not be commercialized.

The statute has been amended since the foregoing decision was rendered and exempts slot machines of the pin ball type which award free games in that it specifically provided that the right of free replays won thereon shall not represent a "valuable thing."

On the basis of such amendment it was held in *People v. One Mechanical Device, supra*, that such pin ball machines did not contravene the statute, and without overruling *People v. One Pinball Machine, supra*, by way of dictum held that a free play was "neither money, the equivalent of money, nor a valuable thing."

For these reasons it is submitted that the case does not necessarily overrule *People v. One Pinball Machine, supra*.

In *Alexander v. Martin, supra*, noted 26 Va. L. R. 955 (1940), plaintiff brought an action to restrain defendant sheriff from seizing and confiscating plaintiff's pin ball machines which awarded free games. The statute prohibited anyone from keeping on his premises, operating, etc., any vending or slot machine (both types being specifically described) or other device pertaining to games of chance of whatever name or kind. In holding that pin ball machines were gambling devices the court held that it was clear that the lure and inducement for a player to operate the machine was the chance of occasionally being allowed to play a game or games without additional cost. In quoting *Kraus v. City of Cleveland, supra*, the court held that amusement is a thing of value and that the less amusement one receives the less value he receives, and the more amusement the more value he receives. The court was also of the opinion that slot machines of this kind encouraged and stimulated the gambling instinct of receiving something for nothing or more for less and were therefore in contravention of sound public policy and laws relating to gambling.

Similarly, in *Westerhaus, Inc. v. City of Cincinnati, supra*, where in an action for declaratory judgment and for equitable relief to prevent defendant law enforcement officers from seizing and confiscating pin ball machines with the free game element, it was held that the machines were gambling devices per se. The

right to a free replay constituted a prize sufficient to bring it within the meaning of the law relating to gambling devices. The court held the case of *Kraus v. City of Cleveland, supra*, controlling and that the facts of the case disclosed three elements of gambling, namely, chance, prize and price.

“Since amusement has value, and added amusement has additional value, and since it is subject to be procured by chance without the payment of additional consideration therefor, there is involved in the game three elements of gambling, namely, chance, price and a prize.” *Westerhaus, Inc. v. City of Cincinnati, supra*, p. 417.

Turning to cases decided under statutes which define gambling and gaming and which specifically use the terms “thing of value,” “other thing,” “anything of value,” etc., it has been held that free games won on pin ball machines were within the meaning of those statutory terms. *Broadbush v. State, supra*; *State v. Langford, supra*; *Hightower v. State, supra*; *Steely v. Commonwealth, supra*; *People v. Cerniglia, supra*; *People v. Gravenhorst, supra*; *Prickett v. State, supra*; *Antrim v. State, supra*; *State v. Paul, supra*; *Giomi v. Chase, supra*.

For instance in *Broadbush v. State, supra*, wherein the defendant was convicted of keeping and exhibiting a slot machine where money or other thing of value is bet thereon, to wit, a pin ball machine which awarded free games to the winner, it was held that such free games constituted a thing of value within the terms of a statute prohibiting the keeping or exhibiting for the purpose of gaming any slot machine

or table of any kind, and which further provided that "any such table . . . machine or device shall be considered as used for gaming, if money or anything of value is bet thereon." The court held that anything that contributed to the amusement of the public is a thing of value.

"We think the free games offered by the machine in question were things of value within the statute . . ." *Broadbudd v. State, supra*, p. 251.

The foregoing decision followed an earlier civil case, *State v. Langford, supra*, which in an *in rem* action to destroy certain marble machines held that free games won on such machines constituted a thing of value. Followed in *Hightower v. State, supra*.

In *Steely v. Commonwealth, supra*, under a statute making it unlawful for anyone to set up, carry on, keep, manage, operate or conduct, or assist therein a keno bank, faro bank or other machine or contrivance used in betting whereby money or "other thing" may be won or lost, it was held that free games won upon a pin ball machine were "other things" which may be won or lost within the terms of the statute.

" . . . The 'other thing' which may be won or lost is not confined to money, nor to corporeal articles of money value. Also it is true that the winning of the right to a replay without any additional deposit possesses the value of a nickel, the amount of its cost. Therefore, the player, if successful, wins the value of a nickel as invested in such an engagement. But there is also a plus value, which is the chance of obtaining another or a number of other free rights to additional

plays. . . .” *Steely v. Commonwealth, supra*, pp. 978-979.

In *People v. Cerniglia, supra*, where the defendant was charged with violating Section 982 of the *New York Penal Law* for possessing and permitting the operation of slot machine placed under his management and control, said machine being a pin ball machine offering free games. It was held that the machine violated the statute which prohibits possessing and permitting the operation in any room, space or building under a person’s management or control of any slot machine or device pursuant to which the user thereof, as the result of any element of chance or other outcome unpredictable to him, may be entitled to receive any money, credit, allowance or thing of value or additional chance or right to use such machine.

“This court is not misled by the apparent harmlessness of awarding a free game. This is but an incentive that fosters the gambling spirit similar to that awarding tokens, prizes, etc. The element of chance is always present. ‘Combining the element of chance with the inducement of receiving something for nothing results in gambling’ . . . ‘A “thing of value” to be the subject of gaming may be “any ‘thing’ affording the necessary lure to indulge the gambling instinct.” ’ . . .” *People v. Cerniglia, supra*, p. 7.

The foregoing decision was followed in *People v. Gravenhorst, supra*, which is construing the same statute held that free games won on a pin ball machine constituted a “thing of value” within the meaning of

Section 982 of the *New York Penal Law*. In a lengthy and well reasoned opinion the court discussed the history of slot machine devices and the continuous attempts by their manufacturers to avoid the effect of judicial condemnation by ingenious ramifications and modifications. The court analyzed in detail the mechanical features of the machine in question and found the machine to be "adapted for use" in such a way that after inserting a coin the machine may be operated and as a result of an element of chance the user may become entitled to a "thing of value." A "thing of value" was held to include free games won on such pin ball machine.

In *Prickett v. State, supra*, under a statute prohibiting machines by which a person will stand to win or lose a thing of value, a thing of value being defined by statute as being "any money, coin, currency, check, clip, token, credit, property, tangible or intangible, amusement or any representative of value, calculated or intended to serve as an inducement for anyone to operate or play any slot machine or punch board," it was held that free games won on a pin ball machine constituted amusement which was a thing of value as defined by statute.

In the case of *Antrim v. State, supra*, p. 848, where the defendant was charged with the unlawful operation of a slot machine, to wit, a pin ball machine that awarded free games, it was held:

"... In accordance with that opinion [*Prickett v. State, supra*] it is the established law that under the 1939 enactment the operation of pin ball

machines was illegal regardless of whether they gave free games for a high score.”

The statute in Oklahoma has since been amended to exclude amusement or entertainment as being a thing of value within the meaning of such statute. However free games still constitute property under the original 1939 statute. See *State v. Sandfer*, 93 Okla. 228, 226 P. 2d 438 (1951).

In *State v. Paul*, *supra*, wherein the defendants were indicted for owning and operating pin ball machines giving free games to the player attaining a certain score, it was held under a statute prohibiting any person from keeping a slot machine or device in the nature of a slot machine on his premises “which may be used for the playing of money or other valuable thing” that free games were within the provision of the statute “other valuable thing.” The court stated that “Anything that contributes to the amusement of the public is a *thing of value*.” *State v. Paul*, *supra*, p. 741. The court further held that the gambling statutes were written long before the pin ball machines were invented, and though legislation could have specifically provided for the pin ball machine situation yet the trend of decisions indicates that such machines are basically against public policy, citing many numerous cases involving devices which complied with the letter but not the spirit of the law in the field of vice and gambling. The court held that these machines fostered the gambling spirit and that free games won thereon were things of value and the machines were operated in contravention of the law.

Finally in *Giomi v. Chase, supra*, it was held that free games awarded to a player of a pin ball machine constituted anything of value within the meaning of a statute similar to the Hawaii statute under consideration. The statute provided:

“It shall hereafter be unlawful to play at, run or operate any game or games of chance such as keno, faro, monte . . . roulette . . . fan tan, poker . . . or any other game or games of chance played with . . . slot machines or any other gaming device by whatsoever name known, for money or anything of value . . .” *Giomi v. Chase, supra*, p. 716.

In a well-reasoned opinion the court held that amusement is a thing of value in that the right to a free replay on such a machine is a thing of value within the meaning of the statute directed against gaming.

“ . . . The player at a pinball machine proves it when he deposits his five cent coin for the privilege of playing it. And the correctness of the assertion is but emphasized if the lure and inducement to the first play spring from the hope that before it is ended, luck will favor the player by awarding him additional free games. If, as one of the quoted opinions says, the prize were a theatre ticket, none would question it as constituting value. The fact, however, that the stake won is small does not alter the verity of the principle involved.” *Giomi v. Chase, supra*, p. 719.

The term “anything of value” includes a multitude of items tangible and intangible. In this connection it said:

“... The legislature itself makes no distinction between the kinds of value meant and it is not the province of the courts to do so. The rather harmless and innocent character of the amusement afforded the player on the machine in question may suggest to some that it ought to be outside the interdiction of the statute. The legislature has thought otherwise and the matter being one of policy the courts can have no proper concern therewith.” *Giomi v. Chase, supra*, p. 719.

It is submitted that the holdings in the foregoing decisions are the majority and better view based on reason and principle. The last mentioned quotation from *Giomi v. Chase, supra*, clearly answers the reasoning found in contrary decisions to the effect that free games are not things of value since no one, unless he possessed a vacuous mind, could find such silly amusement valuable. Concededly the persons who find such amusement valuable are probably not of the highest intellectual calibre, yet they are the very people the law aims to protect from the insidious appeal that such machines make to the gambling instinct which is found in so many human beings. The aim of the gambling laws is to protect the weaker members of society from their own foibles. Hence, the law makes no distinction as to the kinds of value meant nor is it in the province of the courts to do so.

3. Analysis of Appellant's Cases.

The appellant has cited several cases in support of his position that free games do not constitute things of value. A case heavily relied upon is that of *Gayer*

v. Whelan, 59 Cal. App. 2d 255, 138 P. 2d 763 (1943), a civil action against the district attorney for possession of pin ball machines seized as lottery or gambling devices. The pin ball machine involved awarded free games to the player who won a certain score. It is submitted that the case is distinguishable from the situation at bar for the following reasons:

First, the provision of Section 11343, *Revised Laws of Hawaii*, 1945, under which the appellant, David Naumu, is charged to wit: "or any other game in which money or anything of value is lost or won" does not appear in Section 330-A of the *Penal Code of California* cited in the *Gayer v. Whelan* case. The absence of such a provision in the California statute is a crucial point distinguishing the two cases.

Second, the phrase interpreted and construed by the court in *Gayer v. Whelan, supra*, was "representative or articles of value" and not "anything of value." The question in that case was succinctly stated by the court on p. 766 as follows:

" . . . Does the amusement afforded by a free game, or games, awarded the player for a high score amount to 'merchandise, money, *representative or articles of value*, checks, or tokens, *redeemable in, or exchangeable* for money or any other thing of value'? . . ." (Emphasis added.)

In discussing the question the court was of the opinion that the word, "'representative' . . . would have to represent or stand for some inanimate object which the player would receive as a reward for the high score." The word "article" meant "some mate-

rial or tangible object," and that free games being intangible were not within the meaning of such word. In conclusion the court made the following statement:

"Under the foregoing rules of statutory construction we are required to hold that the clause of section 330a of the Penal Code, under consideration must mean that the *representative, or article of value*, obtained through a high score on the pin ball machine, must be some material or tangible thing of value, and that securing the amusement of a free game or games on the machine, and nothing more, does not come within *that* definition and is not within the prohibition of the section." (Emphasis added.) *Gayer v. Whelan, supra*, p. 768.

Hence, *Gayer v. Whelan, supra*, is inapplicable to the case now before the Court.

The case of *In re Wigton*, 151 Pa. Super. 337, 30 A. 2d 352, cited by the appellant is probably the only case holding squarely that free games won upon pin ball machines do not constitute things of value. Analysis of that decision, however, discloses that the reasons cited by the court merely beg the question. The court holds:

"... Syllogistically if the player enjoys the play enough to pay money for the privilege the right to play has some value to him. But to come within the Act, it must not merely have value to him; it must be a thing of value..." *In re Wigton, supra*, p. 354.

This reasoning is self-contradictory, since to be a "thing of value" it must be valuable to someone, and that someone can only be the player. If he is willing

to pay a nickel for the possibility of winning it must be a thing of value to him and to him alone. The fact that the court itself may not consider such amusement as being valuable is immaterial since different people place different values upon different types of amusement. The members of the Pennsylvania court may have valued a game of golf or bridge more than the persons who played the pin ball machines in question. But the court overlooked the fact that the legislature did not distinguish between the kinds of value meant and that it is not the province of the courts to do so. *Giomi v. Chase, supra*. It is submitted that it is enough that some people value free games won on a pin ball machine sufficiently to part with money in order to obtain the chance to win them.

Appellant also cites the case of *State v. Betti*, 23 N.J. Misc. 169, 42 A. 2d 640 (1945). The machine in question in said case is different from the one at bar in that it "contained no device for the recording or the awarding of free games upon the achievement of a designated high score." Consequently, the only question therein was whether the fact that the machine could be arranged to provide from one to three free games by making certain mechanical changes therein constituted a violation of the statute which prohibited any slot machines which may be used for the playing of "money or other valuable thing." The court held that the machine was violative of the statute but on the grounds just cited.

The court distinguished *Hunter v. Teaneck*, 128 N.J.L. 164, 24 A. 2d 553 (1942), where a pin ball

machine awarding free games was considered, and held that the right to receive free games won on such a machine was in violation of the gambling statute.

The law of New Jersey on the question of free games won on a pin ball machine as constituting a thing of value has been laid down in the case of *State v. Paul*, *supra*, already discussed, which holds such free games to be things of value.

Appellant also cited the case of *Mills Novelty Co. v. Farrell*, 64 F. 2d 476 (1933), involving a mint vending machine. The statute therein prohibited the playing of any game for any valuable thing. The court was of the opinion that the possibility of receiving additional humorous sayings upon the machines was not a sufficient lure to the gambling instincts but was rather an advertising feature which attracted customers. Hence, such a machine was not a gambling device. The reasoning of the court and the type of machine involved distinguish that decision from the instant case.

The case of *Washington Coin Mach. Ass'n v. Callahan*, 142 F. 2d 97 (C.A., D.C. 1944), and *Davies v. Mills Novelty Co.*, 70 F. 2d 424 (1934) are not applicable to the question involved in this appeal since the statutes in each case were "property" statutes and did not use the term "thing of value." Hence the cases are no authority for the proposition cited by the appellant.

In summary, except for the case of *In re Wigton*, *supra*, the cases cited by the appellant can be distinguished from the instant case on the basis of the

reasoning or the statute involved. As previously stated the reasoning of the Pennsylvania court in *In re Wigton, supra*, merely begs the question. For a thing to be of value it must be of value to someone—and the statute makes no requirement as to who that someone must be. It is submitted that if it has value to anyone then that is sufficient to bring the game within the meaning of the statute.

4. History and Analysis of the Gambling Statute.

Section 11343, *Revised Laws of Hawaii*, 1945, had its origin in Section 1 of Chapter XL of the *Penal Code* of 1850, relating to gambling which provided:

“Whoever by playing at cards, or any other game, wins or loses any sum of money or thing of value is guilty of gaming.”

Chapter XL provided criminal penalties and civil remedies, the latter remaining practically unchanged in our present law. Section 1, already referred to, was amended in minor respects by later acts (Chapter V, *Sessions Laws of Hawaii*, 1870, and Chapter XLI, *Sessions Laws of Hawaii*, 1890). Except for the sections relating to civil remedies all of the laws relating to gaming were repealed and reenacted in their present form by Act 21, *Laws of Provisional Government*, 1893-4. This repeal and reenactment of the gaming laws grew out of the revolution of 1893 wherein the monarchy of Queen Liliuokalani was overthrown. The enactment of Act 21 was a reaction to the excesses of the legislature and monarchy in its enactment of the opium and lottery bills and the attempt by Queen

Liliuokalani to abrogate the then existing constitution and to promulgate her own constitution.

The enactment of Section 11343, *supra*, clearly shows that the framers intended to prohibit all forms of gambling then known and which would thereafter be invented or devised.

As hereinbefore stated, the original act prohibited one enumerated type of game, to wit, cards, and then prohibited any other game wherein any other sum of money or thing of value could be won or lost. The new act was more detailed and comprehensive in its scope and provided as follows:

“Sec. 11343. Playing prohibited games. Every person who deals, plays, or carries on, opens or causes to be opened, or who conducts either as owner or employee, whether for hire or not, any game of faro, monte, roulette, tan, fan tan, or any banking or percentage game played with cards, dice or any devise for money, checks, credit or any representative of value or any other game in which money or anything of value is lost or won, and every person who plays or bets at or against any such prohibited game or games, and every person present where such game or games are being played or carried on, is guilty of a misdemeanor.” (*R.L.H.* 1945.)

Upon analysis, the prohibitions of Section 11343, *supra*, appear to be directed at “every person who deals, plays, or carries on, opens or causes to be opened, or who conducts either as owner or employee, whether for hire or not” any of the enumerated games. It also includes every person who is present or who

plays or bets at or against any such prohibited game or games. Clearly, the act is aimed at those persons who conduct the games and also the players and the spectators. The latter portion of this section has been held constitutional. *Territory v. Wong, et als.*, 40 Haw. 257 (1953). It appears that the act is also intended to prohibit and repress professional gambling, for who but a professional gambler would open or cause to be opened, or conduct a gambling game as owner or employee whether for hire or not? Who but a professional gambler would "cause to be opened" anything but a professional gambling house? Evidently, the framers intended that the commercial gaming houses shall have no place in Hawaii.

The statute also enumerated the type of games which are prohibited, to wit, "faro, monte, roulette, tan, fan tan, or any banking or percentage game" and further specifies the implements by which the latter of such games was to be played—"cards, dice or any device for money, checks, credit, or any representative of value." These games were apparently games then in existence and known to the framers of the new gaming act. In addition to the aforementioned enumerated games the statute also provides a general clause which is clearly intended to include other games which might be devised or which were not then known to the framers. This prohibits "or any other game in which money or anything of value is lost or won." This particular phrase is the only one that has been retained from the previous law relating to gambling, Section 1, *supra*. This latter

clause, a general provision, has been liberally construed by the Hawaii court both under the early law as provided in the *Penal Code* of 1850 and also under the later law, Act 21, *supra*. For instance, the words "any other game" have been held to include a horse race (*dicta*), *Agnew v. McWayne*, 4 Haw. 422 (1881); a lottery, *The King v. Ah Lee and Ah Fu*, 5 Haw. 545 (1886); Pak Kap Pio, a Chinese lottery, *The King v. Yeong Ting*, 6 Haw. 576 (1885); "7-11," commonly known as "craps," *Territory v. Apoliona*, 20 Haw. 109 (1910); black jack or high card, *Territory v. Tsutsui*, 39 Haw. 287 (1952); and by implication, paikau, *Territory v. Wong & Hong, et als.*, 40 Haw. 423 (1954).

Since the provision "any other game" has been liberally construed by the Hawaii Supreme Court, similarly, in view of the holdings in other jurisdictions and the clear intent of the Hawaii Legislature, the term "anything of value" should also be liberally construed to include free games won on a pin ball machine.

Such construction is warranted in view of the clear legislative purpose of the statute, as expressed by its terms, to outlaw gaming in all its forms. The fact that pin ball machines were not in existence at the time Section 11343, *supra*, was enacted is no valid reason not to construe such a term as including free games won on such machines.

As stated in 24 *Am. Jur., Gaming & Prize Contests*, Section 35, p. 422:

“... The fact that slot machines had not been invented at the time of the passage of a statute against gaming devises does not afford any reason why they should not be comprehended within the meaning of such statutes.” Anno: 20 Ann. Cas. 131.

And in *Giomi v. Chase, supra*, p. 718, it was held:

“A study of our statute satisfies us, conformably to the weight of authority and reason, that when the legislature denounced and rendered unlawful ‘any * * * games of chance, played with * * * slot machines or any other gaming device * * * for money or *anything of value*’, (emphasis ours), it purposely refrained from attempting any enumeration of the multitude of items constituting ‘value’, tangible and intangible, comprehended within the phrase ‘anything of value’. No doubt the legislature, mindful of the ingenuity ever employed to escape the interdiction of anti-gambling laws, reasoned that if it adopted an all embracing, all consuming phrase, such as this, its true meaning and intent could not be defeated by subtle and refined construction. It no doubt was familiar with the rule that where the language is clear and unambiguous, there is no room for construction. *Atlantic Oil Producing Co. v. Crile*, 34 N.M. 650, 287 P. 696. And so it employed language free from ambiguity. We have no right to fritter away its meaning by artful construction.”

It has been held by the Hawaii Supreme Court that the reasonable and direct purport of the enactment of Section 11343, *supra*, was “*to prohibit as well as discourage all types of gaming.*” *Territory v.*

Wong, et als., supra, p. 263. Such an interpretation is in harmony with the general rules relating to statutes prohibiting gaming.

“ . . . The purpose of the Legislature was to discourage and repress gambling in all its forms and the law is to be construed so as to accomplish, so far as possible, the suppression of the mischief against which it is directed. The evil which the law chiefly condemns is betting and gambling organized and carried on as a systematic business. The reason is obvious. Curb the professional with his constant offer of temptation, coupled with ready opportunity, and you have to a large extent controlled the evil . . .” *People v. Gravenhorst, supra*, p. 771.

It is common knowledge that pin ball machines are not operated solely for amusement but constitute a nefarious subterfuge for wide spread gambling in the form of pay-offs to players who have won free games by proprietors of establishments where the machines are displayed. The “take” of the pin ball machines is usually split percentage wise between the proprietor of the establishment and the owner of the machine. Though ostensibly the machines are for amusement only, the existence of the pay-off scheme has been recognized by the courts.

For example, in *People v. Gravenhorst, supra*, p. 776, a prosecution for possession of a slot machine, the court dwelt on this aspect of the pin ball machines:

“The court holds no brief for the contention of defense that the machine is operated solely for amusement. The fact that the records of the Po-

lice Department disclose that 4,524 arrests were made in 1939 and 1940, resulting in convictions in 83% of the cases, does not substantiate this argument. The report of the city department referred to above, that one out of every three persons who own or lease pinball machines in this city, has been arrested at least once, and that 40% to 50% of the income derived from these machines are paid out in prizes, fails to support this claim. He would be a credulous person indeed, who could believe that the customers playing for nothing but points, expected only amusement, and were not actuated by the belief that they could use them to obtain money or other things of value. *Chambers v. Bachtel*, 5 Cir., 1932, 55 F. 2d 851, 853; *Harvie v. Heise*, *supra*. In *Steed v. State*, 1934, 189 Ark. 389, 72 S.W. 2d 542, 543, the court declared that '[slot or marble machines] are gambling devises per se because the only reasonable and profitable use to which they may be put is use in a game of chance.' "

And in *People v. One Pinball Machine*, *supra*, p. 955, it was stated:

"Winter and summer resorts, hotels, restaurants, passenger vessels, taverns, bars, dance halls, filling stations, and numerous other places, all over the country, are infested with pinball machines of varied types and character. While they vary in mechanical details, size and shape, and in the name of the game played from the original slot machines, the ultimate result however of the playing is the same, in principle as the playing of the original slot machines. While it does not appear from the evidence in this case still it is

common knowledge that the so-called free game is frequently but a subterfuge, and that the common practice is for the proprietor, when the player obtains a winning score, to pay off in money or merchandise. It is also common knowledge that the machine itself is sometimes used by players to determine who shall buy the drinks or pay for refreshments, cigars or lunch and when so used it is a gambling device within the meaning of our statute . . .”

See also: *People v. One Mechanical Device, supra*; *State v. Doe, supra*; *State v. Ricciardi*, 18 N.J. 441, 114 A. 2d 257 (1955).

The existence of the practice and scheme of making pay-offs to winners of free games on pin ball machines constitutes a lure to the gambling instinct. Customers in stores, restaurants, bars, drive-ins, and the like are thereby encouraged to play these machines. This results in large incomes to the owners of the machines and to the proprietors of the establishments in which they are displayed, thereby breeding businesses of questionable nature interested in the use and operation of these machines.

Another facet of the mischief intended to be repressed by the gambling laws is the fact that pin ball machines directly contribute to conditions which cause juvenile delinquency. Such machines encourage juveniles to become idle, to loiter around establishments where the machines are displayed, and where pay-offs are made, to encourage such juveniles to gamble and commit more serious offenses. See *People v. Gravenhorst, supra*, p. 777.

The existence of pin ball machines, particularly where the pay-off feature is present, encourages the gambling instinct which tends to demoralize the community, family and individual—another obvious evil which the law intends to suppress.

“It is not questioned that gambling, in the various modes in which it is practiced, is demoralizing in its tendencies and therefore an evil which the law may rightfully suppress without interfering with any of those inherent rights of citizenship which it is the object of government to protect and secure. Gambling is injurious to the morals and welfare of the people and it is not only within the scope of the state’s police power to suppress gambling in all its forms, but its duty to do so. The present tendency of courts and Legislatures is to extend the law of nuisances to every sort of gaming. Am. Jurisprudence, Vol. 24, ‘Gaming & Prize Contests’, Sections 3 and 11. Gambling is a pernicious practice, the offspring of idleness, and the prolific parent of vice and immorality, detrimental to the best interests of society, and encouraging wastefulness, thriftlessness and a belief that a livelihood may be earned by means other than honest industry. The use of these machines is a racket and constitutes a fraud on the innocent public who are unaware of the insidious evil of the display. They contribute directly to delinquency among children and instill and develop a desire to gamble among those who frequent them.” *People v. Gravenhorst, supra*, p. 777.

In summary, the term “anything of value” as used in Section 11343, *supra*, is all-embracing in its purport

and meaning as laid down by dictionary, textbook, and case law definitions. This conclusion is supported by judicial decisions in other jurisdictions defining similar statutory terms when applied to pin ball machines awarding free games, and is in accord with the history and analysis of our statutes relating to gaming. It is submitted that without question the majority and better view, based upon reason and principle, is that free games won upon a pin ball machine constitute "anything of value" within the meaning of Section 11343, *supra*. On this issue the decision of the Hawaii Supreme Court should be affirmed.

C. A GAME PLAYED UPON A PIN BALL MACHINE IS WITHIN THE TERM "ANY OTHER GAME" AS PROVIDED IN SECTION 11343, REVISED LAWS OF HAWAII, 1945.

As previously noted herein, the phrase "any other game" in which money or anything of value is lost or won was included in the original gaming act, Section 1, Chapter XL, *Penal Code* of 1850. This phrase was incorporated into the later act, Act 21, *Laws of the Provisional Government*, 1893-4, in substantially the same form. The term "game" has been defined as follows:

"... In general, however, on the ground that in general principle there is no distinction between the various methods that may be adopted for determining by chance who is the winner and who the loser of a bet, whether it is by throwing dice, flipping a coin, turning a card, or running a

race, the word 'game' has been given a very comprehensive and nontechnical meaning. It is held to extend to physical contests, whether of man or beast, where practiced for the purpose of deciding wagers or for the purpose of diversion, as well as to games of hazard or skill, by means of instruments or devices, and it may be said to embrace every contrivance or institution, whether public or private, of which the object is to furnish sport, recreation, or amusement, on which money or any other article of value can be won or lost by the result of such contrivance or institution . . ." 24 *Am. Jur., Gaming & Prize Contests*, Section 13, p. 407.

Similarly, in *The King v. Yeong Ting, supra*, pp. 577-578, the Hawaii court held under the old gambling statute:

" . . . Our statute is silent as to whether the game, to be within the law, shall be one of skill, of chance, or of both skill and chance. Therefore it includes games of all these descriptions . . ."

"Our statute is, as I have said, peculiar, and allows great latitude in construction."

The term "any other game" under the old law and under Section 11343, *supra*, also includes, as previously noted, a horse race (*dicta*), *Agnew v. McWayne, supra*; a lottery, *The King v. Ah Lee and Ah Fu, supra*; Pak Kap Pio, a chinese lottery, *The King v. Yeong Ting, supra*; "7-11," commonly known as "craps," *Territory v. Apoliona, supra*; black jack, high card and a rigged or crooked card game, *Terri-*

tory v. Tsutsui, supra; Territory v. Bollianday, et al., 39 Haw. 590 (1952); and paikau, *Territory v. Wong & Hong, et als, supra*. It need not be a banking or percentage game to be within the terms of the statute. *Territory v. Apoliona, supra*. In view of the liberal construction given by the Hawaii court to the term "any other game" in both the earlier and later gambling statutes, it is submitted that those terms include a game played and won upon a pin ball machine. *Foley v. Whelan*, 219 Minn. 209, 17 N.W. 2d 367 (1945). Such a construction is clearly within the purpose and scope of the gaming statute, and is in accord with the ordinary and usual meaning given to the word "game." The rule of *ejusdem generis* has no application under the circumstances. *People v. Gravenhorst, supra; Foley v. Whelan, supra; Pepple v. Headrick*, 64 Idaho 132, 128 P. 2d 757 (1942); *City of Seattle v. MacDonald*, 47 Wash. 298, 91 Pac. 952, 17 LRA (NS) 49 (1907); 38 C.J.S., *Gaming*, Section 2b; 24 *Am. Jur.*, *Gaming & Prize Contests*, Section 4; see also *Republic Haw. v. Ben*, 10 Haw. 278 (1896) holding *ejusdem generis* rule not applicable to criminal statute relating to profanity in a public place. See also: *State v. Villines*, 107 Mo. App. 593, 81 S.W. 212 (1904); *Van Pelt v. State*, 193 Tenn. 463, 246 S.W. 2d 87 (1952); and *Grafe v. Delgado*, 30 N.M. 150, 228 Pac. 601 (1924), holding rule not applicable to other terms of gaming statutes.

It is respectfully submitted that the language, "any other game" is broad enough to include such a game as one played on a pin ball machine.

D. THE SUPREME COURT OF HAWAII WAS NOT IN ERROR IN HOLDING THAT SECTION 11343, REVISED LAWS OF HAWAII, 1945, WAS NOT VAGUE, INDEFINITE AND UNCERTAIN SO AS TO VIOLATE APPELLANT'S CONSTITUTIONAL RIGHTS.

In his Specification of Error No. 2, appellant contends that the phrase "anything of value" in Section 11343, *Revised Laws of Hawaii*, 1945, is too vague, indefinite and uncertain to withstand the strict construction due a penal statute.

Appellee submits that a statute may be so vague as to violate the due process clause of the Fifth as well as the Fourteenth Amendments. In *Connally v. General Construction Co.*, 269 U.S. 385, 70 L. Ed. 322, cited by appellant, the United States Supreme Court affirmed an interlocutory decree of the district court enjoining the enforcement of a statute containing the phrase "current rate of per diem wages in the locality where the work is performed." In so doing, the Court made the oft-quoted statement that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

However, actually the court has required less definiteness than is indicated in the foregoing statement in the *Connally* case. This is borne out by the following statement contained in that very same case on page 328:

"The question whether given legislative enactments have been thus wanting in certainty has

frequently been before this court. In some of the cases the statutes involved were upheld; in others, declared invalid. The precise point of differentiation in some instances is not easy of statement. But it will be enough for present purposes to say generally that the decisions of the court upholding statutes as sufficiently certain, rested upon the conclusion that they employed words or phrases having a technical or other special meaning, well enough known to enable those within their reach to correctly apply them, *Hygrade Provision Co. v. Sherman*, 266 U.S. 497, 502, . . . *Omaechevarria v. Idaho*, 246 U.S. 343, 348, . . . or a well-settled common law meaning, notwithstanding an element of degree in the definition as to which estimates might differ, *Nash v. United States*, 229 U.S. 373, 376, . . . *International Harvester Co. v. Kentucky* . . . or, as broadly stated by Mr. Chief Justice White in *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 92, . . . ‘that, for reasons found to result either from the text of the statutes involved or the subjects with which they dealt, a standard of some sort was afforded.’ ”

In the case of *United States v. Petrillo*, 332 U.S. 1, 91 L. Ed. 1877, 1883, the court upheld the validity of a statute which punished any person attempting to coerce a licensee to employ “any person or persons in excess of the number of employees needed by such licensee to perform actual services.” The court there reasoned that the language used by Congress did provide an adequate warning as to what conduct fell under its prohibition. The court stated:

“ . . . That there may be marginal cases in which it is difficult to determine the side of the

line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense. *Robinson v. United States*, 324 U.S. 282, 285, 286. . . . It would strain the requirement for certainty in criminal law standards too near the breaking point to say that it was impossible judicially to determine whether a person knew when he was wilfully attempting to compel another to hire unneeded employees. See *Screws v. United States*, 325 U.S. 91 . . . ; *United States v. Ragen*, 314 U.S. 513, 522, 524, 525 . . . ”

The court in the *Petrillo* case further noted that the Constitution did not require impossible standards.

The language that was struck down in the *Connally* case presented a double uncertainty fatal in a criminal statute. The words “current rate of per diem wages” did not denote a specific sum, but minimum, maximum and intermediate amounts, indeterminately, varying from time to time and dependent upon such considerations as the kinds of work done and the efficiency of workmen hired. The word “locality” was an elastic term which might equally be applicable to areas measured by rods or by miles, depending upon circumstances. The language did not provide a rule of sufficient objectivity to guard against an arbitrary result.

In considering the above cases with the case at bar the court below held that the phrase “anything of value” did give adequate warning as to what falls under its ban, and that it did provide a sufficient standard for the objective and impartial application of the law. See *Territory v. Naumu*, 43 Haw. 66, 70.

Appellant argues that the statute in question enumerates certain games, yet is silent as to games played on a pin ball machine. Appellant further contends that an accused, under Section 11343, *supra*, would have to tax his imagination in order to conclude that a pin ball machine is a "device"; that a game played on such machine is a banking game; that a free game won on a pin ball machine constituted something of value.

Appellee submits that in order to make a statute sufficiently certain in its constitutional requirements does not demand the specifying of designated acts or conduct intended by the legislators to be prohibited. *Lorenson v. Superior Court*, 35 Cal. 2d 49, 216 P. 2d 859.

This principle has been stated more completely in the following language:

"A gambling game, within the general language of an ordinance prohibiting the playing of any such game, is not taken out of the operation of the ordinance by the fact that the general language is preceded by an enumeration of prohibited games which does not include the particular one in question." 24 *Am. Jur., Gaming & Prize Contests*, Sec. 4, p. 400.

"*Ejusdem generis*. Where general words of Prohibition follow an enumeration of particular games or devices which are prohibited, such general words must be construed *ejusdem generis* with the games or devices which are specifically named. *However, the ejusdem generis rule will not be applied where the legislature evidently intended that it should not be; and, when the mean-*

ing or intention of the legislature is clear, the doctrine cannot properly be applied for the purpose of narrowing or limiting the meaning of a word or phrase used in a gaming statute so as to defeat the legislative intent. Obviously, the rule will not be applied so as to restrict the general language to 'banking' or 'percentage' games, where not all of the games specifically named in the statute are of that kind and class." (Emphasis added.) 38 *C.J.S., Gaming*, Sec. 2b, p. 76.

Likewise, on page 187 of *Territory v. Uyehara*, 42 Haw. 184, the Supreme Court of Hawaii in construing Section 11343, *supra*, upheld the general rule by stating the following:

"... The language of the gambling statute includes within its prohibition every game in which money or anything of value is lost or won. The game need not be *ejusdem generis* with the games enumerated in the statute . . ."

See also, *Territory v. Apoliona*, *supra*.

As argued by appellant the Hawaii legislature did not specify or enumerate that which was to be considered "anything of value." However, such an omission is not fatal where gambling is the subject matter of the legislation. "Anything of value" is a standard in and of itself; its frequent use as a standard in penal statutes is an assurance that it is understood by men of ordinary intelligence.

Appellee further submits that the construction and interpretation of Section 11343, *supra*, is sufficient to satisfy the requirements of due process of law where

one is given adequate warning of the offense with which he may be charged. See *Lanzetta v. New Jersey*, 306 U.S. 451, 456, 59 S. Ct. 618, 83 L. Ed. 888; *Winters v. New York*, 333 U.S. 507, 510, 68 S. Ct. 665, 92 L. Ed. 840.

The statute involved here is not a novel one in the realm of general law. As stated above it has existed in the present form since its re-enactment in 1893 as Act 21, *supra*. Further, since its enactment in 1893 Section 11343 has survived without amendment any number of attacks regarding its constitutionality. See *Territory v. Wong, et als, supra*. In that case defendant on page 258, argued that the statute was null and void and therefore, unconstitutional in that it was “. . . so vague and uncertain in its standard of conduct that it violates the due process provision of the Fifth Amendment.” The Hawaii court, in upholding the constitutionality of the statute, stated the following on pp. 262-263:

“ . . . Each of the foregoing may be answered by applying the statute in the reasonable and direct purport of its enactment *to prohibit as well as discourage all types of gaming . . .*”

Also in the *Wong* case the Hawaii court further abided by the rule that a reasonable and adequate disclosure of the legislative intent regarding the evil to be denounced in language giving notice of the practices to be avoided conforms to the requirements of the Constitution of the United States:

“Factual situations, it is urged, have developed in past prosecutions under section 11343 which

border upon the dividing line of lawful and unlawful presence. 'Whenever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so * * * and if he does so it is familiar to the criminal law to make him take the risk.' (*United States v. Wurzbach*, 280 U.S. 396, 399, 74 L. Ed. 508, 50 S. Ct. 167.)

"That the prohibition of gaming is within the police power of the Territory is too well settled to necessitate the citation of precedent. Since the purpose of enactment of section 11343 is within that power, this court will not question the legislative methods adopted to eliminate the evils of gaming.

"We find that section 11343 conveys sufficiently definite warning of proscribed conduct when measured by the common understanding and practices employed in gaming . . ." (pp. 263-264.)

In view of the intent of the Hawaii legislature to forbid all forms of gambling, coupled with the Hawaii court's endeavor to give meaning and force to its gambling statutes, no basis can be given for supporting appellant's contention that Section 11343, *supra*, is so vague, indefinite and uncertain as to deprive him of his Constitutional rights of due process.

It is submitted that the complexities of the social problems dealt with by the Hawaii legislature require that a practical construction be given to the language used lest the legislative objectives and aims be easily avoided or nullified. See *City of Moberly v. Deskin*, 169 Mo. App. 672, 155 S.W. 842, 844:

“... In no field of reprehensible endeavor has the ingenuity of men been more exerted than in the invention of devices to comply with the letter, but to do violence to the spirit and thwart the beneficent objects and purposes, of the laws designed to suppress the vice of gambling. Be it said to the credit of the expounders of the law that such fruits of inventive genius have been allowed by the courts to accomplish no greater result than that of demonstrating the inaccuracy and insufficiency of some of the old definitions of gambling that were made before the advent of the era of greatly expanded, diversified, and cunning mechanical inventions. The chief element of gambling is the chance or uncertainty of the hazard. It is not essential that one of the parties to the wager stands to lose. The chance taken by the player may be in winning at all on the throw, or in the amount to be won or lost, and the transaction should be denounced as gaming whenever the player hazards his money on the chance that he may receive in return money or property of greater value than that he hazards. If he is offered the uncertain chance of getting something for nothing, the offer is a wager, since the operator offers to bet that the player will lose and in accepting the chance the player bets that he will win. . . .”

Further, it is contended that in view of the above reasons, Section 11343, *supra*, should be construed in the light of the rule that the constitutionality of statutes is the strongest presumption known to the courts. *United States v. Brewer*, 139 U.S. 278, 35 L. Ed. 190; *State v. Smith*, 35 Neb. 13, 52 N.W. 700; *State v.*

Lancashire Fire Ins. Co., 66 Ark. 466, 51 S.W. 633; *City of Des Moines v. Manhattan Oil Co.*, 193 Iowa 1096, 184 N.W. 823, 188 N.W. 921; *Commonwealth v. Libbey*, 216 Mass. 356, 103 N.E. 923.

“It is an elementary principle that where the validity of a statute is assailed and there are two possible interpretations, by one of which the statute would be unconstitutional and by the other it would be valid, the court should adopt the construction which would uphold it. It is the duty of courts to adopt a construction of a statute that will bring it into harmony with the Constitution, if its language will permit.

“The duty of the courts so to construe a statute as to save its constitutionality when it is reasonably susceptible of two constructions includes the duty of adopting a construction that will not subject it to a succession of doubts as to its constitutionality, for it is well settled that a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubt upon that score. . . .”
11 *Am. Jur., Constitutional Law*, Sec. 97, pp. 725-730.

In *State v. One 5¢ Fifth Inning Baseball Machine*, *supra*, the pin ball machine involved offered no prizes or free games but the Supreme Court of Alabama held that it nevertheless came under the State’s general gambling statute which prohibited:

“. . . Any machine, mechanical device, contrivance, appliance or invention, whatever its name or character, which is operated or can be operated as a game of chance.” (p. 29.)

As indicated, the statute above in comparison to Section 11343, *supra*, is broad and very plain in its terms. The defendant contended and the Alabama court admitted on p. 28:

“There is no proof the machine has been used for gambling, nor that players were offered inducements by way of prizes or other awards. Defendant contends the machine is one for amusement only, in the playing of which skill plays a more or less important part, and as a consequence it does not come within the influence of our condemnation statute.”

In spite of this argument the Alabama court refused defendant's plea that the act was penal and subject to strict construction. It held the act was within the police power of the state and violated no provision of the Constitution, either State or Federal. On this point the court stated on p. 29:

“We think it clear enough, from the language of this act, especially definition (d), that the law-making body deemed it necessary to prohibit all such machines and devices which could be operated as a game of chance, regardless as to whether there was a ‘pay off’ or not, in order to fully suppress the gambling evil. That this was within the police power of the State and violated no provision of the Constitution, either State or Federal is well demonstrated . . .”

Also in *Prickett v. State*, *supra*, p. 462, defendant was charged under a statute reciting the following:

“ . . . Any person who sets up, operates or conducts or who permits to be set up, operated or

conducted, in or about any place of business, or in or about any place, whether as owner, employee or agent, any slot machine for the purpose of having or allowing same to be played by others for money, property, tangible or intangible, coin, currency, check, chip, token, credit, amusement or any representative of value or a thing of value, shall be deemed guilty of a misdemeanor . . .”

In a petition for rehearing (201 P. 2d 798, 799) the Oklahoma court not only denied it but stated:

“To have held otherwise would have nullified the legislative act which prohibited the setting up of these machines ‘to be played by others for money, property, tangible or intangible, coin, currency, check, chip, token, credit, amusement, or any representative of value or a thing of value.’ . . .

“It is apparent that the Legislature intended to absolutely prohibit the operation of these machines. No plainer language could have been employed to express the legislative intent to prohibit the operation of these machines irrespective as to whether they were played for free games, prizes, or merely for the amusement of the player.

“It was properly a function of the Legislature to determine in the exercise of the police power whether the operation of such machines tended to be injurious to the health, safety, morals, or general welfare of the public. It is not within the power of the court to strike down a legislative enactment unless it is clear that there is no reasonable basis upon which the act might be sustained. There is a strong presumption in favor of the constitutionality of every legislative act,

and in so far as slot machines are concerned, it is a matter of common knowledge that they are generally adapted to fast, easy gambling; that the label 'for amusement only' placed on many machines is a subterfuge to deceive enforcement officials and hamper them in prosecutions for gambling. The Legislature with a full knowledge of these conditions have prohibited the operation of such machines for amusement or for any other purpose."

In *State v. Le Blond*, 108 Ohio St. 41, 140 N.E. 491, the court announced the principle that legislation otherwise valid would not be judicially declared null and void on the ground that the same was unintelligible and meaningless, unless it was so imperfect and so deficient in its details as to render it impossible of execution and enforcement.

In *Adams v. Greene*, 182 Ky. 504, 206 S.W. 759, the court held that a statute could not be held void for uncertainty if any practical or sensible construction could be given it. Mere difficulty in ascertaining its meaning, the court said, or the fact that it was susceptible to interpretation would not render it nugatory. The court further added that if, after exhausting every rule of construction, no sensible meaning could be given the statute, or if it were so incomplete that it could not be carried into effect, it would then have to be pronounced inoperative and void.

State v. Livingston Concrete Bldg. & Mfg. Co., 34 Mont. 570, 87 Pac. 980, held that although the intention of the legislature might have been expressed in

plainer terms, a court would not hold a solemn legislative enactment of no force or effect because of indefinite language, unless the court found itself unable to define the purpose or intent of the legislature. The court added that inasmuch as the intent of the legislature was the essence of the law it became the function of the court to determine and make known, if possible, such purpose or intent.

In *State v. West Side St. Ry. Co.*, 146 Mo. 155, 47 S.W. 959, the court ruled that a statute could not be held void for uncertainty if any reasonable and practical construction could be given it. It further ruled that it was the duty of the courts to endeavor by every rule of construction to ascertain the meaning of, and to give full force and effect to every enactment of the legislature not obnoxious to constitutional prohibitions.

It was further held in *Hunt v. State*, 195 Ind. 585, 146 N.E. 329, that a court would not nullify an enactment of the legislature because the language used was indefinite in some particular, if the purpose or intent of the legislature could be ascertained.

See also: *State v. Dvoracek*, 140 Iowa 266, 118 N.W. 399; *Cochran v. Loring*, 17 Ohio 409; *Town of Murphy v. C. A. Webb & Co.*, 156 N.C. 402, 72 S.E. 460; *Western Lumber & Pole Co. v. City of Golden*, 23 Colo. App. 461, 130 Pac. 1027.

It is submitted that this Court should approve and should be in accord with the authorities and decisions cited above. In *Territory v. Uyehara*, *supra*, p. 188,

the Hawaii court quoted *Giomi v. Chase, supra*, in stating the following:

“‘A study of our statutes satisfies us, conformably to the weight of authority and reason, that when the legislature denounced and rendered unlawful “any * * * games of chance, played with * * * slot machines or any other gaming device * * * for money or *anything of value*” (emphasis ours), it purposely refrained from attempting any enumeration of the multitude of items constituting “value”, tangible and intangible, comprehended within the phrase “anything of value”. No doubt the legislature, mindful of the ingenuity ever employed to escape the interdiction of anti-gambling laws, reasoned that if it adopted an all embracing, all consuming phrase, such as this, its true meaning and intent could not be defeated by subtle and refined construction * * * And so it employed language free from ambiguity. We have no right to fritter away its meaning by artful construction.’”

The other cases cited by appellant—*American Communications Asso. v. Douds*, 339 U.S. 382, 94 L. Ed. 925, 70 S. Ct. 674; *United States v. Cardiff*, 344 U.S. 174, 97 L. Ed. 200, 73 S. Ct. 189; and *Lanzetta v. New Jersey, supra*—add very little to the disposition and solution of the case at bar. Each is clearly distinguishable from the issues presented before this Court.

It is respectfully submitted that appellant, from the general tenor of his brief, concedes that his Specification of Error No. 2 is without serious merit. It would appear, from the emphasis given, that the constitutionality of Section 11343, *supra*, is “challenged” only

as a means of giving this Court jurisdiction in order that appellant may renew his argument that free games won on a pin ball machine do not constitute value. For the reasons contained in this section of this Answering Brief, appellee respectfully urges the dismissal of appellant's Specification of Error No. 2.

CONCLUSION

For the reasons herein contained appellee respectfully submits that the judgment and sentence of the courts below be affirmed.

Dated, Honolulu, Hawaii,
August 18, 1959.

Respectfully submitted,

JOHN H. PETERS

Prosecuting Attorney

FREDERICK J. TITCOMB

Deputy Prosecuting Attorney

City and County of Honolulu

Attorneys for Appellee.

(Appendix Follows.)

Appendix.

Appendix

Penal Code of the Hawaiian Islands

1850

Chapter XL—Gaming

1. Whoever by playing at cards, or any other game, wins or loses any sum of money or thing of value is guilty of gaming.

2. Gaming is of two degrees, viz: gaming on the Lord's day; and where any person shall at any one time or sitting win or lose twenty-five dollars or more is of the first degree, and other gaming is of the second degree.

3. Whoever is guilty of gaming of the first degree shall be punished by fine not exceeding ten times the value of the money or other thing won or lost, or by imprisonment at hard labor not exceeding sixty days.

4. Whoever is guilty of gaming of the second degree shall be punished by fine not exceeding fifty dollars or imprisonment at hard labor not more than thirty days.

5. Whoever shall by playing at cards or any other game, or by betting on the sides or hands of such as do play, lose any sum of money, or (sic) thing of value, and shall pay or deliver the same or any part thereof, may sue for and recover the money or value of the thing so lost and paid or delivered, from the winner thereof.

6. In case the person, so losing such money or any thing of value shall not within three months after

such loss, in good faith and without collusion, prosecute with effect and without unreasonable delay for such money or other thing of value, it shall be lawful for any constable or other officer or person to sue for and recover treble the value of such money or other thing, with full costs of suit, the one half of which shall go to the person so prosecuting, and the other half to the government, for the use of common schools.

7. All notes, bills, bonds, mortgages or other securities or conveyances whatever, in which the whole or any part of the consideration shall be for any money or other thing of value won by playing at cards, or any other game, or by betting on the sides or hands of any person gaming, or for reimbursing or repaying any money, knowingly lent or advanced for any gaming or betting, or lent and advanced at the time and place of such gaming and betting, to any person so gaming and betting, shall be void and of no effect, as between the parties to the same, and as to all persons, except such as shall hold or claim under them, in good faith and without notice of the illegality of the consideration of such contract or conveyance, and whenever any mortgage or other conveyance of lands shall be adjudged void, under the provisions of this section, such lands shall enure to the sole use of and benefit of such person, as would be then entitled thereto, if the mortgagor or grantor were naturally dead; and all grants or conveyances, for preventing such lands from coming to or devolving upon the person, to whose use and benefit the said lands would so enure, shall be deemed fraudulent and of no effect.

8. In every suit brought to recover any money or other thing of value, as provided in section fifth of this chapter, both the plaintiff and the defendant shall be competent witnesses; and no person other than the parties, shall be excused from testifying, touching any offense committed against any of the foregoing provisions relating to gaming, by reason of his having played, betted or staked, at any game; but the testimony of any such person shall not be used against him in any suit or prosecution authorized by any of the foregoing provisions.

Chapter V—Session Laws of 1870

“An Act to Amend the Law Relating to Gaming.

Section 1. Whoever is guilty of gaming shall be punished by fine, not exceeding one hundred dollars, and by imprisonment at hard labor, not exceeding sixty days.

Section 2. The second, third, and fourth Sections of Chapter XXXIX in the Penal Code, relating to gaming, are hereby repealed.

Approved this 8th day of July, A. D. 1870.

KAMEHAMEHA R.”

Chapter XXII—Sessions Laws of 1884

“An act to Amend Chapter XXXIX of the Penal Code Relating to Gaming, by adding thereto a new Section.

Section 1. Chapter XXXIX of the Penal Code is hereby amended by adding thereto Section 9, to read as follows:

Section 9. Every person present in any place or room where any game is carried on, in which any sum of money, or anything of value is lost or won—as a visitor—and every person aiding or abetting gaming, either by furnishing money or anything of value to those engaged in gaming, knowing that such money or thing of value is to be used for gaming, shall be punished by a fine not exceeding fifty dollars, or by imprisonment not exceeding two months, or by both such fine and imprisonment.

Section 2. This Act shall be in force from and after its passage.

Approved this 11th day of August, A. D. 1884.

KALAKAUA, REX.”

Chapter XLI—Session Laws of 1886

Supplementary to Chapter XXXIX of the Penal Code Relating to Gaming.

“Section 1. No person under any pretense, form, denomination or description whatsoever, or by means of any device or contrivance whatsoever shall sell or dispose of or agree or promise, whether with or without consideration, to sell or dispose of any real or personal property whatsoever to or among any person or persons whomsoever by means of any game of chance or of any other contrivance or device whatsoever whereby any such real or personal property shall be sold or disposed of or divided or allotted to or among any person or persons by lottery or chance whether by the throwing or casting of any dice or

drawing of any tickets, cards, lots, numbers or figures or by means of any wheel or otherwise howsoever.

Section 2. Every person who shall, contrary to the provisions hereof, sell or dispose of, or agree or promise, whether with or without consideration, to sell or dispose of any lands or tenements or any estate or interest therein, or of any ship or vessel, goods, wares or merchandise whatsoever, shall for every such offense forfeit and pay a sum not exceeding five hundred dollars.

Section 3. Any person who shall establish, commence or be a partner in any lottery or in any scheme by which prizes, whether of money or of any other matter or thing are gained, drawn for, thrown or competed for by lot, dice or any other mode of chance, or who shall sell or dispose of, or purchase or have in possession, any ticket or other means by which permission or authority is gained or given to any person to throw for, compete or have any interest in any such lottery or scheme, and any person who shall manage or conduct or assist in managing or conducting any such lottery or scheme shall for every such offence forfeit and pay a sum not exceeding five hundred dollars, and for any second offence, besides such penalty shall be liable to imprisonment with or without hard labor for any term not exceeding six months.

Section 4. If any person being the owner of any painting, drawing, sculpture or other work of art, or literature, or mineral specimens or mechanical models shall apply to the Minister of the Interior for permission to dispose of the same by raffle or chance, it

shall be lawful for the Minister of the Interior, if he think fit, to grant a license for that purpose subject to such conditions and restrictions as he may think it right to impose, and if such conditions and restrictions are complied with, the provisions of this Act or any other law for the time being in force relating to gaming and lotteries shall not apply to such owner or to any other persons who may be bona-fide concerned in such transaction. Notwithstanding anything in this Act or any other law for the time being in force relating to gaming and lotteries it shall be lawful for any association formed for the purpose of promoting agriculture, or horticulture or for improving the breed of poultry to dispose of by lot or chance any specimens bona-fide shown at any show held under the control or management of such association.

Section 5. Any person who shall have unlawfully in his possession any tool, device, implement or ticket used or which can be used for the drawing, carrying on or playing at any lottery, game or faro, monte, roulette, lansquenet, rouge et noir or any other banking game played with cards, dice or any device shall be punishable by a fine not exceeding five hundred dollars for the first offence, and for every subsequent offence by a fine not exceeding five hundred dollars and imprisonment with or without hard labor not exceeding three months, and such tool, device, implement or ticket shall be forfeited and destroyed.

Section 6. Police and District Magistrates throughout the Kingdom shall have power and jurisdiction

to hear and determine, subject to appeal, all complaints for the violation of the provisions of this Act.

Effective October 15, 1886.

KALAKAUA REX.”

ACT CXI—Session Laws of 1892

An Act Granting a Franchise to Establish and Maintain a Lottery

(Summary—not verbatim)

Section 1. Grants exclusive franchise to 6 named individuals or to a corporation as may thereafter be organized by them to establish and maintain a lottery for a period of 25 years.

Section 2. Majority of said grantees shall be domiciled in Honolulu, and business shall be conducted in City of Honolulu where all drawings of the lottery shall take place.

Section 3. Grantees to pay \$500,000 per annum for franchise in quarterly installments in each.

Section 4. Proceeds of franchise to be used for purposes hereinafter set forth.

First: Subsidy to be paid for an ocean cable between Honolulu and North American Continent.

Second: Subsidy to be paid for construction of a railroad around Island of Oahu \$50,000 per annum to company to construct and maintain such railroad.

Third: Subsidy for construction and maintenance of railroad from Hilo through Hilo and Hamakua Districts. \$50,000 / annum.

Fourth: Subsidy for improving and maintaining improvements of Honolulu Harbor.

Fifth: For roads, bridges, landings and wharves in Hawaiian Kingdom. \$175,000 / annum.

Sixth: For encouragement of industries. \$50,000 / annum.

Seventh: For the encouragement of tourist travel. \$25,000 / annum.

Other provisions cover the setting up of corporation and operation of lottery. Also prohibits any lottery other than as provided in this act.

Approved 13th of January, 1903.

LILIUOKALANI R.

Act 6—Laws of the Provisional Government

An Act to repeal an Act entitled “An Act granting a Franchise to establish and maintain a lottery,” approved on the 13th day of January A. D. 1893.

Be it Enacted by the Executive and Advisory Councils of the Provisional Government of the Hawaiian Islands:

Section 1. An Act entitled “An Act granting a franchise to establish and maintain a lottery,” approved on the 13th day of January A. D. 1893, is hereby repealed.

Section 2. This Act shall take effect from the date of its publication.

Approved this 25th day of January A. D. 1893.

SANFORD B. DOLE

President of the Provisional Government
of the Hawaiian Islands

J. A. King

Minister of the Interior

Act 21—Laws of the Provisional Government

An Act to Prohibit Gambling and Gaming.

Be it Enacted by the Executive and Advisory Councils of the Provisional Government of the Hawaiian Islands:

Section 1. Every person who contrives, prepares, sets up, draws, maintains or conducts, or assists in maintaining or conducting any lottery is guilty of a misdemeanor.

Section 2. A lottery is any scheme for the disposal or distribution of property by chance among persons who have paid or promised to pay any valuable consideration for the chance of obtaining such property, or a portion of it, or for any share or any interest in such property upon any agreement, understanding or expectation that it is to be distributed or disposed of by lot or chance, whether called a lottery, raffle, che fa, pakapio, gift enterprise or by whatever name the same may be known.

Section 3. Every person who sells or buys, gives or receives, has in possession or in any manner whatever

deals with any ticket, chance, share or interest, or any paper, certificate or instrument purporting or understood to be or to represent any ticket, chance, share or interest in or depending upon the event of any lottery, is guilty of a misdemeanor.

Section 4. All moneys or property offered for sale or distribution in violation of any of the provisions of this Act are forfeited to the Government and may be recovered by information filed or by action brought by the Attorney General or his authorized representative.

Section 5. Every person who deals, plays, or carries on, opens or causes to be opened, or who conducts either as owner or employee, whether for hire or not, any game of faro, monte, roulette, tan, fan tan, or any banking or percentage game played with cards, dice or any devices for money, checks, credit or any representative of value or any other game in which money or anything of value is lost or won, and every person who plays or bets at or against any of said prohibited game or games, and every person present where such game or games are being played or carried on, is guilty of a misdemeanor.

Section 6. Every person who by the game of "three card monte", "shell game" or any other game, device, sleight of hand, pretension to fortune telling, trick or other means whatever by use of cards or other implements or instruments, or while betting on sides or hands of any such play or game, fraudulently obtains from another person money or anything of value is guilty of a misdemeanor.

Section 7. Every person duly summoned as a witness for the prosecution on any proceeding had under this Act, who neglects or refuses to attend as required is guilty of a misdemeanor.

Section 8. No person otherwise competent as a witness is disqualified from testifying as such concerning any offence committed under this Act on the grounds that such testimony might criminate himself, but no prosecution can afterwards be had against him for any such offence concerning which he has testified.

Section 9. Every person who lets or permits to be used any building or vessel, or any portion thereof, knowing that it is to be used for setting up, managing or drawing any lottery, or for the purpose of selling or disposing of lottery tickets, chance, share or interest in or depending upon the event of any lottery, or who knowingly permits any game or games prohibited by this Act to be played, conducted or dealt in any building or vessel owned or rented by such person in whole or in part, is guilty of a misdemeanor.

Section 10. Every person guilty of a misdemeanor as provided in this Act shall be punishable by a fine of not more than one thousand dollars, or imprisonment at hard labor not exceeding one year.

Section 11. District Magistrates shall have jurisdiction to try and determine all cases arising under this Act.

Section 12. No suit or prosecution pending for any offence committed, or for the recovery of any penalty or forfeiture incurred under any law heretofore en-

acted shall in any case be affected by the passage of this Act.

Section 13. The following laws and parts of laws are hereby repealed:

Section 1 of Chapter 39 of the Penal Code;

Chapter 5 of the Session Laws of 1870;

Chapter 22 of the Session Laws of 1884;

Chapter 41 of the Session Laws of 1886;

Chapter 41 of the Session Laws of 1890;

Chapter 75 of the Civil Code, and Section 26 of Chapter 55 of the Penal Code.

Section 14. Section 80 of the Civil Code and Section 28, Chapter 55 of the Penal Code are hereby amended by striking out the following words, to wit: "Nor allow any gaming on such table or alley."

Section 15. This Act shall take effect upon publication.

Approved this 7th day of March, A. D. 1893.

SANFORD B. DOLE

President of the Provisional Government
of the Hawaiian Islands

J. A. KING

Minister of the Interior

